165-593

1015

165-593

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 171.

MARGARET E. WALKER, PLAINTIFF IN ERROR,

vs.

THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 21, 1894.

(15,687.)

(15,687.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 171.

MARGARET E. WALKER, PLAINTIFF IN ERROR,

vs.

THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print.
Writ of error and return	*a*	1
Citation and acceptance of service	*b*	1
Caption	1	2
Transcript from district court	1	2
Declaration	1	2
Special appearance for defendant	7	5
Order for alias process, &c	8	5
Appearance for defendant	8	5
Demurrer to declaration	9	6
Order for continuance	10	6
Order for continuance	11	7
Order sustaining demurrer to declaration	12	7
Amended declaration	12	8
Order granting time to plead	19	11
Demurrer to amended declaration	19	11
Order to submit demurrer	22	12
Order overruling demurrer to amended declaration	22	13
Order filing motion for bill of particulars, &c	24	13
Order filing bill of particulars and granting rule to plead	24	13
Bill of particulars	25	14
Order filing notice as to bill of particulars	29	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., August 15, 1896.

	Original.	Print
Order to plead	30	16
Order filing pleas	30	17
Plea	31	17
Order for continuance	31	17
Order on suggestion of death of plaintiff	32	18
Order reviving cause in name of administratrix	32	18
Order for security for costs	33	18
Order setting aside order for security for costs	34	19
Order allowing amendment of declaration	34	19
Order beginning trial	35	19
Order continuing trial	36	20
Order concluding trial	37	20
Verdict	37	20
Special findings of fact	37	20
Motion for judgment for defendant	39	21
Judgment	40	22
Exception to judgment	40	22
Order setting aside judgment and filing motion for new trial	41	22
Order overruling motion for new trial	41	22
Order overruling motion in arrest of judgment	41	23
Judgment	41	23
Clerk's certificate	42	23
Assignment of errors	43	23
Order taking motion for certiorari under advisement	44	24
Order granting motion for certiorari	44	24
Writ of certiorari	45	25
Return to writ of certiorari	46	25
Interrogatories submitted to the jury	46	26
Clerk's certificate	48	27
Order taking cause under advisement	49	28
Judgment	49	28
Opinion	50	29
Clerk's certificate	52	30
Assignment of errors	53	31

a The President of the United States to the honorable the judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Margaret E. Walker, plaintiff in error, and The New Mexico and Southern Pacific Railroad Company, defendant in error, a manifest error hath happened, as it is said, to the great damage of the said plaintiff in error, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal Supreme Court, Territory of New Mexico.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of July, A. D. 1894.

H. S. CLANCY,
Clerk Supreme Court of New Mexico.

I hereby make return to the foregoing writ by annexing thereto an authenticated transcript of the record, citation to adverse party, and the opinion filed in said cause, under my hand and the seal of said supreme court.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY,
Clerk Supreme Court of New Mexico.

b The United States of America to The New Mexico and Southern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, holden at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Nexico, wherein Margaret E. Walker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to all parties in that behalf.

Witness the Honorable Thomas Smith, chief justice of the su

preme court of the Territory of New Mexico, this 30th day of July, 1894.

THOMAS SMITH,
Chief Justice Supreme Court of the Territory of New Mexico.

We hereby acknowledge service of copy of above citation this 14th day of August, A. D. 1894.

W. B. CHILDERS,
R. E. TWITCHELL,
H. L. WALDO,
Attorneys for Defendants in Error.

1 Be it remembered that heretofore, to wit, on 18th day of June, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, the following transcript of record, which said record was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1893.

A. C. WALKER, Plaintiff,
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. 1597.

Be it remembered, that heretofore, to wit: on the 3rd day of November, 1886, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, a declaration in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Socorro. }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting in and for the County of Socorro for the Trial of Causes Arising under the Laws of the Territory of New Mexico, at the November Term, 1886.

2 To the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

Your petitioner, Ashael C. Walker, who is a resident of the county of Socorro, and Territory of New Mexico, complains of the New Mexico and Southern Pacific Railroad Company, a corporation created under the laws of the Territory of New Mexico, and a resident of said Socorro county, and doing business therein, in a plea of trespass on the case.

And thereupon the said Ashael C. Walker, by his attorneys, Leonard & Hamilton, alleges, for that whereas the said plaintiff, before and at the time of committing *of* the grievances by the said defendant hereinafter mentioned, was and from thence hitherto hath

been and still is, lawfully possessed of five and one-half certain lots of land with the appurtenances and improvements thereon, and which lots are known and designated as lots numbered thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and the west half of lot numbered eighteen (18), in block numbered nine (9), of the New Mexico Town Company addition to Socorro, in said county, and Territory of New Mexico, as the same are designated upon the plat of said addition on file in the recorder's office of Socorro county aforesaid, and upon a portion of which said lots there was a hotel building and other buildings and improvements belonging
3 to the said plaintiffs and by reason of the plaintiff's said possession and ownership of the lands and premises aforesaid, he was entitled to the free and uninterrupted use, benefit privilege and enjoyment of the said property and lots of land, with the improvements and buildings thereon, without disturbance, interference, interruption or molestation of his rights, in the quiet, safe and peaceable enjoyment of his said proparty, as aforesaid. And whereas also, long before and from time immemorial, and at the time of committing the grievances hereinafter mentioned, a natural watercourse known as the Rio Grande river, flows in its regular and accustomed channel in a southerly direction, about one-half mile east of the said premises of the plaintiff as above described, into which said Rio Grande river aforesaid, the waters from rainfalls, pass and flow in their natural fall from the surrounding and adjacent country over the plaintiff's and other lands in the vicinity as well as over the lands of the defendant, and flow and empty into the Rio Grande river and the surface water by that means has always been until the time of the grievances herein set forth carried off from the premises of the plaintiff and others without injury or damage to them and their property, yet the said defendant well knowing the premises, but willfully conniving, and unjustly and wrongfully intending to injure, prejudice, and aggrieve the said plaintiff in this respect, and to wholly deprive him of the use,
4 benefit, advantage, profit and enjoyment of his property as aforesaid, and to cause him great loss and damage therein; therein on the first day of May, A. D. 1885, and on divers days and times as well before as after, at the city of Socorro, aforesaid, in the county aforesaid, did dam up, cut up, and close up, all of the natural and usual outlets and places where the surface water as aforesaid had been accustomed to flow to reach their depositing place, the Rio Grande river, as aforesaid, and the plaintiff further says that the road-bed of defendant's railroad runs both parallel with and at right angles to said Rio Grande river, in passing through the city of Socorro aforesaid, and runs also between the said river and the premises of said plaintiff, so that the surface waters as aforesaid in passing over the lots and premises of this plaintiff and others, in order to reach the said river, have to pass over the premises of the said defendants, that the said defendants had up to the time of this grievance herein complained of always maintained and kept open through or under its said beds, sluices, culverts, canals, and carrying off to the river aforesaid the surface waters as they gathered and accumulated on their

said premises in their natural course and descent to the river as aforesaid, by which means the said accumulated surface waters in time of heavy rainfalls, were drained, conducted away from the premises of the defendant and the surrounding premises and also from the premises of the plaintiff and were deposited in the river as
5 aforesaid. That the said defendant wrongfully as aforesaid at, before and since the first day of May, 1885, aforesaid, have closed up, cut off, and made dams at all of the openings and places along the line of its road-bed through which the accumulated surface waters from rainfalls as aforesaid, *was* accustomed to make their escape and have their outlet in natural and artificial courses to the said river, so that by means of the said defendant in damming up, by building heavy dirt and rock embankments and dams in the places and at the culverts, sluices, canals, and other ways of drainage as aforesaid, and in building its road-bed and in raising its road-bed from its former height to a greater height, has prevented and cut off all the surface water as aforesaid from passing beyond its said road-bed, thereby causing all the surface water heretofore flowing to the river as aforesaid, to be dammed up and set back upon the premises of the plaintiff and other property-owners, in the vicinity thereof. And that the said defendant by reason of his said wrongful and unlawful act as aforesaid, by means of closing up and cutting off the outlet and channels by which the surface water as aforesaid was discharged into the river as aforesaid, and retaining the same upon the west line of its road-bed as the same passes through the city of Socorro aforesaid, did on or about the seventh day of September, A. D. 1886, by reason of a heavy rainfall which occurred on
6 or about said day, cause the surface water from said rainfall which had accumulated upon the premises of defendant, and were unable by reason of the dam as aforesaid to escape therefrom, as aforesaid, to set back on the premises of the plaintiff as aforesaid, and form a lake, or pond of waters, from three to four feet in height, covering the whole of the premises of the plaintiff, undermining a large two-story hotel building which was in course of construction, and causing the same to fall to the ground destroying one frame building eighteen feet by twenty-four feet in size, washing out and damaging the foundation of a two-story frame building, and greatly damaging and injuring a frame hotel building by the falling of timbers upon it from the destroyed building, also injuring a large quantity of household goods, consisting of carpets, bedroom, dining-room and kitchen furniture, drowning and causing the death of twelve hogs, destroying corral, and doing and causing great damage, loss and destruction to fences, yards, buildings and houses and other property and improvements of the plaintiff, and that the property so injured, damaged and destroyed by the wrongful acts and doings of the defendant is of value of ten thousand dollars, which is wholly lost to the said plaintiff.

Wherefore the said plaintiff says he is injured and damaged, and has sustained loss and damage to the amount of ten thousand dollars, and therefore he brings this his suit, and asks judgement

7 for the said sum of ten thousand dollars, together with his costs and disbursements in this suit.

LEONARD AND HAMILTON,
Attorneys for Plaintiff.

And thereafter at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, begun and held on 16th day of November, A. D. 1886, and on the first day of said term, the same being the 16th day of November, A. D. 1886, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

A. C. WALKER
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD CO. } No. 1597.

Now comes the defendant and enters its special appearance for the purpose of filing a motion.

And thereafter, on the fourth day of said term, the same being the 19th day of November, A. D. 1886, the following proceedings were had among others, to wit:

8 A. C. WALKER
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD CO. } No. 1597.

It is this day ordered that alias process issue for the defendant, addressed to the sheriff of Santa Fé county, and this cause is continued.

And thereafter at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 28th day of March, A. D. 1887, and on the first day of said term, the same being the 28th day of March, A. D. 1887, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

At this day comes the defendant and enters its appearance, and by consent the defendant has until the first day of the next term of this court to plead.

And thereafter, on the 7th day of November, A. D. 1887, there was filed in the office of the clerk of said court, a demurrer, in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Socorro. }

In the District Court, Second Judicial District, November Term, 1887.

A. C. WALKER, Plaintiff, }
vs. }
THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant. }

And the said defendant, by its attorneys, Henry L. Waldo and C. L. Jackson, Esq'rs, comes and defends the wrong and injury, when, etc., and says the said declaration and the matters and things therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action, thereof against the said defendant, and it, the said defendant, is not bound by law to answer the same.

And this the said defendant is ready to verify, wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendant prays judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it.

And the said defendant shows to the court here the following causes of demurrer to the said declaration, that is to say:

First. That the only matter set up in the said declaration upon which plaintiff bases his claim for damages, *are* that the said defendant's railroad, road-bed, and the grades and embankments thereof are not provided with culverts and passage-ways to allow the surface water, which falls upon, flows over, and from plaintiff's premises to pass away, but stops the same, and throws it back upon and over plaintiff's premises to his injury, all of which, if true, give no cause of action to the plaintiff against the said defendant.

Second. The facts stated in plaintiff's declaration do not constitute a cause of action against the said defendant. And also that the said declaration is in other respects uncertain, informal, and insufficient, etc. Wherefore defendant prays to be hence dismissed with its costs.

HENRY L. WALDO,
C. L. JACKSON,
Defendant's Attorneys.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 7th day of November, A. D. 1887, and on the twentieth day of said term, the same being the 1st day of December, A. D. 1887, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

11 By consent of parties it is ordered that this cause be continued until the next term of this court.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 7th day of May, A. D. 1888, and on the first day of said term, the same being the 7th day of May, A. D. 1888, the following, among other, proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

At this day this cause is continued by consent.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Sorocco, in said district, begun and held on the fifth day of November, A. D. 1888, and *and* on the ninth day of said term, the same being the 15th day of November, A. D. 1888, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of the supreme court of Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

12 A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause is this day heard on demurrer to the declaration and the court having seen the same and being advised, doth order that said demurrer be and the same is hereby sustained, and by consent plaintiff has until the first day of next term to file amended declaration herein.

And thereafter, on the 21st day of March, A. D. 1889, there was filed in the office of the clerk of said court *and* amended declaration, in words and figures as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting in and for the County of Socorro for the Trial of Causes Arising under the Laws of the Territory of New Mexico.

A. C. WALKER, Plaintiff,
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the Hon. William H. Brinker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioner, A. C. Walker, who is a resident of Socorro county and Territory of New Mexico, complains of the New Mexico and Southern Pacific Railroad Company, a corporation organized
13 under the laws of the Territory of New Mexico and a resident of and doing business in said county of Socorro and Territory of New Mexico, in a plea of trespass on the case and damages in the sum of five thousand dollars.

For that whereas, the said plaintiff alleges and charges that at and before the time of the committing of the grievances by the said defendant, hereinafter mentioned, he was and from hence hitherto hath been and still is lawfully possessed and in the occupation of a certain lot or lots of land with the appurtenances and improvements thereon, which lot or lots of land are known and designated as follows, to wit: Lots number thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and the west half of lot number eighteen (18), in block number nine (9) of the New Mexico Town Company's addition to Socorro, all situated in the county of Socorro, Territory of New Mexico, upon a portion of which said lots of land there was a large building used as a hotel, with other valuable buildings, outhouses, stables, fences, barns and improvements and crops upon the land aforesaid, belonging to and in the occupation and possession of said plaintiff, and by reason of the plaintiff's ownership and possession of the premises, lands and improvements aforesaid, he *he* was entitled to the free and undisturbed use and benefit, privilege and enjoyment of the said property, lands and improvements and buildings thereon without disturbance, interference, interruption or molestation of his rights in the quiet
14 and peaceable enjoyment of his said property as aforesaid; and whereas, long before and from time immemorial and at the time of the committing of the grievance hereinafter mentioned a regular water-course known as the Rio Grande flows in its regular and accustomed channel in a southerly direction, distant about one-half mile east of the residence and premises of the plaintiff above described, into which the Rio Grande as aforesaid, the water from the north and west of the residence and premises of the plaintiff and from the Socorro and Magdalena mountains, in the natural fall from thence and the natural and surrounding country, pass over and by the lands of the plaintiff and other lands in the vi-

cinity, as well as over the lands of the defendant company, in natural and artificial water-courses, and flow and empty into the said Rio Grande, and the said water from the north and west of the premises of said plaintiff in its flow through and by means of the natural and artificial water-courses did long before and of right ought to have flown at the time of the committing of the grievances hereinafter mentioned, and have been carried off from the lands and premises of the plaintiff and other- in that vicinity by means of and through said natural and artificial water-courses to the Rio Grande aforesaid without causing injury or damage to the lands and premises of the plaintiff.

Yet the said defendants, well knowing the premises, wickedly contriving and wrongfully and unjustly intending to injure,
15 prejudice and aggrieve the plaintiff in this respect and to wholly deprive him of the free use and benefit and advantage, profit and enjoyment of his property as aforesaid, and to cause him great loss and damage therein, on the first day of May, A. D. 1885, and on divers other days and times as well before as after that time at the city of Socorro as aforesaid in the county of Socorro, as aforesaid, did dam up cut off and close up all the natural and artificial and usual outlets and places and courses where the water flowing from the co-ntry *a*-jacent to the lands and premises of the plaintiff and from the Socorro and Magdalena mountains aforesaid, and where it had been accustomed to flow to reach their depositing place, the Rio Grande aforesaid; and the plaintiff further sayeth that the road-bed of the defendant railroad runs parallel and at right angles with the said Rio Grande in passing through the city of Socorro, and runs between the said Rio Grande and the lands and premises owned and occupied by the said plaintiff as above described, so that the water aforesaid in passing through its natural and artificial course aforesaid, in order to reach the said Rio Grande, has to pass over the road-bed and premises of the said defendant.

And the said plaintiff further alleges and charges that the said defendant wickedly, unjustly and unlawfully contriving to damage the plaintiff as aforesaid, at the county of Socorro aforesaid, before and at and since the time aforesaid, to wit: the first day of May, A. D. 1885, have closed up, cut off and made dams across,
16 and placed obstructsons at all of the openings, sluices and natural and artificial water-courses along the line of its road-bed through which the water aforesaid was wont and accustomed to flow and of right ought to flow and make its escape, and have its outlet through and in its natural and artificial courses to the river aforesaid, so that by means of the defendant's having closed up, cut off and obstructed and dammed up all of the openings, sluices, and canals and natural and artificial water-courses aforesaid, by building heavy earth and rock embankments and dams in and across the natural and artificial water-courses and other ways of escape and drainage of the water aforesaid, and by building its said road-bed and in grading the same, and raising the grade thereof, has prevented and cut off and dammed up the means of escape of the water from the Magdalena and Socorro mountains, and from the

country to the north and west of the lands and premises of the plaintiff and thereby prevented, obstructed and hindered the flow and passage of said water through, under or beyond the defendant's railroad, and thereby causing all the water heretofore flowing in its *ann natural* artificial courses to the Rio Grande as aforesaid, to be dammed up and set back upon and over the premises of the plaintiff, and other property in the vicinity thereof, and that the said defendant by reason of its said wrongful, unjust and unlawful acts as aforesaid, by means of closing up, cutting off and obstructing and damming
17 up all of the natural and artificial water-courses where the said water was discharged and had its outlet into the Rio Grande as aforesaid and retaining and holding the same upon the west and north line of its road-bed, as its said road-bed passes through the city of Socorro. And the plaintiff further alleges that by reason of the grading, filling and embankment and closing up, cutting off and damming up all of the natural and artificial water-courses as aforesaid, the said defendant did on or about the ninth day of September, A. D. 1886, at the county of Socorro, aforesaid, stop up, impede, hinder and dam up and set back the water flowing from the adjacent country to the north and west of the lands and premises of the plaintiff in its natural flow and de-cent to the Rio Grande aforesaid, and to cause the same to flow back upon and over the lands and premises owned and occupied by the plaintiff, and formed a large lake or channel of water from three to four feet in depth, covering the whole of the lands and premises of the plaintiff, thereby undermining and causing a large building used as a hotel and the furniture in said building on said lots and premises to fall down and become totally destroyed, also destroying other buildings and houses and barns and greatly injuring and damaging the same and damaging large amounts of hay growing upon and standing upon said premises and lots of land owned and occupied by the
18 plaintiff, and also destroying other crops of hay and grain and vegetables growing and standing upon the premises of the plaintiff and also injuring, damaging and destroying other property owned by the plaintiff, and doing great injury and damage to the fences and yards and other improvements of the plaintiff and to the lands of the plaintiff, and that the property so wickedly and wrongfully and unlawfully damaged and destroyed by the doings and wrongful acts of the defendant is of the value of ten thousand dollars which is wholly lost to the said plaintiff.

Wherefore the plaintiff says he is injured and sustained damage to the amount of ten thousand dollars, and therefore he brings this suit, and asks judgement of this honorable court against the defendant in the sum of ten thousand dollars, and costs of suit.

JAMES G. FITCH,
WARREN & FERGUSSON,
Attorneys for Plaintiff.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the fifteenth day of

April, A. D. 1889, and on the third day of said term, the same being the 17th day of April, A. D. 1889, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William H. Brinker, associate justice of
19 the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding.

A. C. Walker
vs.
N. M. & S. P. R. R. Co. } No. 1597.

By consent defendant has until second Monday to plead to amended declaration in this cause.

And thereafter, on the 22nd of April, A. D. 1889, there was filed in the office of the clerk of said court, a demurrer in words and figures as follows, to wit:

In the District Court, Second Judicial District, Socorro County, New Mexico, April Term, 1889.

A. C. Walker, Plaintiff,
vs.
The New Mexico and Southern Pacific Railroad Company, Defendant.

And the said defendant, by Henry L. Waldo, its attorney, comes and defends the wrong and injury, when, etc., and says that the said amended declaration and the matters therein contained, in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and the said defendant is not bound by law to answer the same.

And the said defendant further states and shows to the court here the following grounds for demurrer to the said amended declaration, that is to say:

For that it appears from the said declaration that the al-
20 leged grievances and grounds of damage therein set forth are merely the result of the natural flow of surface water.

For that it appears from the said amended declaration that the said alleged grievances, accumulations of water and grounds of damage did not arise from the stoppage of or interference with any natural water-courses or the damming or overflowing of the waters thereof, or from any trespass fault or negligenec of defendant, but rather that the water which caused the damage and injury alleged was an accumulation of surface water collected from the surrounding country, which the obstructions of the defendant threw back upon and overflowed the plaintiff's premises.

For that the said amended declaration is double, uncertain, evasive and argumentative, and notwithstanding anything therein contained, all the pretended grievances and damages therein set forth may have been occasioned by the accumulation of surface

water upon the lands of the plaintiff without any fault, wrong-doing or negligence of the said defendant.

For that the said declaration is uncertain and indefinite in failing to specify or describe the alleged "natural and artificial water-courses" therein referred to, and in failing intelligibly to show that the alleged injury and damage resulted from waters running in such water-courses and overflowing therefrom because of the acts, faults or negligence of the said defendant, and in failing intelligibly to identify such pretended water-courses or to show that they
21 are public water-courses or that the plaintiff has any right, title, estate or interest of, in or to the same or the flow of water therein, or to show that the same are fixed or permanent water-courses.

For that it appears from the said amended declaration that the gist and gravamen thereof are certain pretended grievances and injuries resulting from the accumulation of surface water flowing as surface water in a natural way upon and from the water-shed of a large district of country and not being the waters of any natural or artificial water-course, and further, that the pretended "natural and artificial water-courses" mentioned in the said amended declaration are not, in any proper or legal sense, natural or artificial water-courses, or either, but merely the uncertain, indefinite, varying, unidentified ways, lines, tracks or courses in which from time to time the surface water aforesaid naturally runs according to the varying circumstances of its origin and natural fall.

And for that the said amended declaration is in other respects uncertain, informal and insufficient. And this the said defendent is ready to verify. Wherefore, by reason of the insufficiency of the said amended declaration in this behalf, the said defendant prays judgement, and that the said plaintiff may be barred from having or maintaining his aforesaid action against it, etc.

H. L. WALDO,
R. E. TWITCHELL,
ISAAC S. TIFFANY,
Attorneys for Defendant.

22 And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 21st day of October, A. D. 1889, and on the second day of the said term, the same being the 22nd day of October, A. D. 1889, the following among other proceedings were had and entered of record, to wit:

Present the Hon. William D. Lee, associate justice of the supreme court of Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

By consent of the parties hereto the demurrer to the declaration filed herein, is to be submitted to the court on briefs.

And thereafter, in vacation, on the 27th day of June, 1893, the following proceedings were had and entered of record, to wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Socorro.

MARGARET E. WALKER
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY.

And it being made to appear to the satisfaction of the court that on the 14th day of May, A. D. 1891, the defendant's demurrer
23 to the plaintiff's amended declaration was by the court overruled and was entered by the clerk of this court upon his minutes of the proceedings of that day, which said minutes are now on file in the office of said clerk, but that through the oversight and inadvertence of said clerk, he failed to transcribe the entry of the order overruling said demurrer from his said minutes into the record for that day; it is therefore ordered that the following entry and order be made and entered of record as of the 14th day of May, A. D. 1891:

This cause coming on to be heard on the defendant's demurrer to the plaintiff's amended declaration, and the court having heard the arguments of counsel and being duly advised, doth order that the said demurrer be and the same is hereby overruled.

(Signed) A. A. FREEMAN, *Judge.*

Dated at Eddy, in the fifth judicial district, this 27th day of June, 1893.

And thereafter at a regular term of the district court of the fifth judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 4th day of May, A. D. 1891, and on the twelfth day of the said term, the same being the 16th day of May, A. D. 1891, the following proceedings among others were had and entered of record, to wit:

Present the Hon. A. A. Freeman, associate justice of the
24 supreme court of the Territory of New Mexico, and judge of the fifth judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now comes the defendant by its attorneys and files herein motion for a bill of particulars in each of the above-entitled and foregoing three causes, which motion is confessed.

Now the plaintiffs in said causes are ruled to plead on Monday, May 18, 1891.

And thereafter, on the thirteenth day of the said term, the same being the 18th day of May, 1891, the following among other proceedings were had and entered of record, to wit:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now comes the respective plaintiffs in the above-entitled and foregoing three causes and file a bill of particulars in each of said causes, by their attorneys, and move the court for a rule on the defendant to plead therein, within three days after the service of the copies of said bills of particulars, which motion is heard and sustained, and it is ordered that the defendant do file pleas in said causes, within three days after the service of the copies of the said bills of particulars.

And thereupon, on Monday, the 18th day of May, 1891,
25 there was filed in the office of the clerk of said district court, a bill of particulars, in the words and figures as follows, to wit:

In the District Court of the Fifth Judicial District of the Territory of New Mexico, Held in and for the County of Socorro, May Term, 1891.

A. C. WALKER
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD CO. } No. 1597.

The said plaintiff, under and in compliance with a rule of court in the above-entitled cause, exhibits and files the following bill of particulars.

The natural and artificial outlets and places and courses in and through which the water flows from the north and west of the residence and premises of the plaintiff as alleged in the declaration are described and located as follows, to wit:

First. A certain natural bed or channel of water through which in a natural fall the waters drain and flow from the Socorro and Magdalena mountains, commencing at a point about eight or nine miles in a southwesterly direction from the residence of the plaintiff in the city of Socorro, and then extending in an easterly direction about four miles, and thence in a northwesterly direction to a point at and within the northern portion of the city of Socorro, and thence in an easterly direction to the northeasterly portion of the city of Socorro, and thence in a southerly direction to the Rio Grande,
at a point about three or four miles southerly from the resi-
26 dence of the plaintiff. Also a portion of the above-mentioned natural bed or channel of water diverging therefrom in a southwesterly portion of the city of Socorro, at a point near the grist-mill of Manuel Vigil, in the city of Socorro; extending thence easterly to the southern portion of the city of Socorro, and north of the Magdalena Branch Railroad track to a point of its confluence with the main portion again of said natural bed or channel above described, to a point about one-half mile southwesterly from the depot building of the defendant company in the city of Socorro. Also a certain natural bed or channel of water, commencing at or near the

Rio Grande smelter and thence easterly to the main bed or natural channel of water above described, at a point about one-fourth of a mile west of the Methodist Episcopal church in the city of Socorro; also a certain other natural bed or channel of water commencing at or near the foot of the Socorro mountains about one-half mile north of the Rio Grande smelter and extending thence easterly to a point of junction with the main natural bed or channel first above describe-, about one-fourth of a mile northerly of the Catholic cemetery in the city of Socorro; and also a certain other natural bed or channel of water, commencing at or near the foot of the Socorro mountains at a point about one mile in a northerly direction from the said last above-described channel, and thence extending
27 in a southeasterly direction to the Rio Grande valley, about three-quarters of a mile northwest of the residence of the plaintiff. Also a certain ditch or canal artificially constructed, commencing at a point near the brewery in the city of Socorro, and at or near the natural channel first above described and extending thence in a southerly direction about three-quarters of a mile to a point at or near the road-bed of the defendant.

Second. The natural and artificial outlets and water-courses through which the water from the Magdalena and Socorro mountains, in its natural fall from thence, and the surrounding country, pass by and over the lands and premises of the plaintiff as well as the lands of the defendant, and other lands in the vicinity, are those described in the specification first above set forth.

Third. The natural and artificial water-courses in which said water flowed, and emptied into the Rio Grande, prior to the commission of the grievances alleged in and by plaintiff's declaration, are those located and described in and by the specification first above set forth.

Fourth. The natural and artificial and usual outlets and places and courses which defendant did dam up, and cut off, and thereby occasioned the injury complained of, are the same described in the first above specification, and the places where the same were dammed up, cut off and closed up, were at or near the point
28 of intersection of the road-bed or embankment of the defendant with the railroad or embankment extending thence westerly, at a point about one-half mile south of the depot building of the defendant company, and during the year 1883, the precise day being unknown to the plaintiff.

Fifth. The buildings and houses destroyed as alleged in said declaration are the following, to wit:

One two-story adobe hotel, situate on lots fourteen (14), and fifteen (15), in block nine (9), in the city of Socorro, as described in plaintiff's declaration, valued at four thousand dollars, and damaged to the amount of four thousand dollars	$4,000 00
One one-story adobe storehouse, situate on lot thirteen (13), as described in plaintiff's declaration, valued at five hundred dollars and damaged to the amount of five hundred dollars	500 00

One one-story adobe kitchen, situate on lots thirteen (13), and fourteen (14), as described in plaintiff's declaration, valued at four hundred dollars and damaged to the amount of four hundred dollars	$400 00

Sixth and seventh. The buildings and houses, barn, carpets, and furniture injured and damaged as alleged in plaintiff's declaration are of the character,
29 location, and value following, to wit:

One two-story frame and adobe hotel, situated upon lots thirteen (13), and fourteen (14), as described in plaintiff's declaration, damaged to the amount of one thousand dollars	1,000 00
One one and one-half story frame grain-house, situate upon lot seventeen (17,) as described in the plaintiff's declaration, damaged to the amount of five hundred dollars	500 00
One barn, situated on lots sixteen (16), and seventeen (17), as described in plaintiff's declaration damaged to the amount of three hundred dollars.....	300 00
Carpets and furniture in hotel as described in plaintiff's declaration, destroyed and damaged to the amount of five hundred dollars.....	500 00
Total	$7,200 00

KELLEY, WARREN & FERGUSSON,
Plaintiff's Attorneys.

And thereafter, on the fifteenth day of the said term, the same being the 20th day of May, A. D. 1891, the following among other proceedings were had and entered of record, to wit:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

30 Now come the plaintiffs in the above entitled and foregoing two causes, by their attorneys, and file therein notices of the service of copies of their respective bills of particulars.

And thereafter, on the eighteenth day of the said term, the same being the 23rd day of May, A. D. 1891, the following among other proceedings were had and entered of record, to wit:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now upon motion of the respective plaintiffs therein, the defendant in the above entitled and foregoing three causes, is ruled to plead before the fifth Monday of the present term of this court.

And thereafter, on the twenty-first day of the said term, the same being the 27th day of May, A. D., 1891, the following among other proceedings were had and entered of record, to wit:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now come the parties in the above entitled and foregoing three causes, and file therein their pleas in joinder of the issues.

And thereupon, on the same day, to wit: the 27th day of May, A. D., 1891, there was filed in the office of the clerk of said district court a plea in the words and figures as follows, to wit:

31 In the District Court, Second Judicial District, Territory of New Mexico, County of Socorro, March Term, A. D. 1887.

A. C. WALKER, Plaintiff,
vs.
NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. 1597. Trespass on the Case.

And the said defendant by its attorney, Henry L. Waldo, Esq., now comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances laid to its charge or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above complained against it, in his said declaration, and of this, it the said defendant, puts itself upon the country, etc.

HENRY L. WALDO,
Attorney for Defendant.

And thereafter, at a regular term of the district court of the fifth judicial district of the Territory of New Mexico, begun and held on the 7th day of December, A. D. 1891, within and for the county of Socorro, in said district, and on the fourth day of the said term, the same being the 10th day of December, A. D., 1891, the following among other proceedings were had and entered of record, to wit:

Present the Hon. A. A. Freeman, associate justice of the supreme court of — Territory of New Mexico, and judge of the fifth judicial district court thereof, presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

32 Now it is ordered that the last above and foregoing four causes be continued until the next term of this court.

And thereafter, at a regular term of the district court of the fifth judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 2nd day of May, A. D. 1892, and on the fourth day of the said term, the

same being the 5th day of May, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

Present: The Hon. A. A. Freeman, associate justice of the supreme court of the Territory of New Mexico, and judge of the fifth judicial district court thereof presiding:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now comes the defendant by its attorney and suggests the death of the plaintiff herein, which suggestion is admitted by the attorney for plaintiff.

And thereafter, on the twelfth day of the said term, the same being the 14th day of May, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

A. C. WALKER
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause coming on to be heard on the motion — Mar-
33 garet E. Walker, administratrix of the said A. C. Walker, to revive said suit in her name, and the death of said plaintiff having been heretofore suggested; and the said defendant, by Chavez & Dougherty, its attorneys, failing to show cause why said cause should not be revived as prayed, it is therefore ordered that the said cause be and the same is hereby revived in the name of Margaret E. Walker, administratrix of A. C. Walker, deceased, as plaintiff herein.

And thereafter on the forty-fifth day of the said term, the same being the 22nd day of June, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

Now comes the defendant by its attorneys and moves the court that a rule issue on plaintiff to file a bond for the security of the costs of this suit; which motion is heard and sustained, and it is thereupon ordered by the court that the plaintiff do file herein a bond for the security of the costs of this suit, on or before the first day of the next term of this court.

And thereafter, at a regular term of the district court of the fifth judicial district of the Territory of New Mexico, in and for the county of Socorro, begun and held on the fifth day of December, A. D. 1892, and on the first day of said term, the same being the 5th day of December, A. D. 1892, the following, among other proceedings were had and entered of record, to wit:

34 Present the Hon. A. A. Freeman, associate justice of the supreme court of the Territory of New Mexico, and judge of the fifth judicial district court thereof, presiding:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause coming on to be heard on the motion of the plaintiff to discharge the rule entered herein at the last term of this court, requiring the plaintiff to furnish security for costs, accompanied by the affidavit of plaintiff that she has no assets as administratrix to pay the costs, and the court being duly advised doth order that the rule requiring the said plaintiff to furnish security for costs be set aside and vacated, and that the said plaintiff have the process of the court free of charge; to which said order the defendant by its attorneys excepts.

And thereafter, on the seventh day of the said term, the same being the 12th day of December, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause coming to be heard on the plaintiff's motion for leave of the court to amend the declaration herein by interlineation, said motion is heard and the court being sufficiently advised in the premises doth sustain the said motion, and now comes the plaintiff by her attorney and in open court amends the declaration,
35 in the particulars set forth in the motion herein; and now on motion of the plaintiff, the defendant is by the court ruled to file its plea herein within three days from and after this date.

And thereafter, on the thirteenth day of said term, the same being the 19th day of December, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Administratrix,
vs.
NEW MEXICO AND SOUTHERN PACIFIC R. R. COMPANY. } No. 1597.

Now this cause coming on to be heard, come the parties and come the following jury, to wit: Jose de la Cruz Lopez, Casamero Montoya, Leandro Baca, Rumaldo Chavez, W. H. Lowery, Jose Padilla y Silva, Dario Gonzales, Domingo Romero, Jose Leon Gabaldon, Asanio Bustos, Gabriel Mora, Juan Romero, twelve good and lawful men, taken from the body of Socorro county, duly selected, drawn, accepted and empannelled, and sworn to well and truly try the issues joined in this cause pending, and a true verdict render, according to the law and the evidence; and the evidence not being completed, the jury are by the court instructed to separate until the incoming of court tomorrow morning.

And thereafter, on the fourteenth day of said term, the same being the 20th day of December, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

36 MARGARET E. WALKER, Adm'r'x, } No. 1597.
vs.
N. M. & S. P. R. R. Co. }

Now again comes the parties and come the jury, who being called are all found present, and the trial of this cause proceeds, and the evidence not being completed, the jury are by the court instructed to separate until the incoming of court tomorrow morning.

And thereafter, on the fifteenth day of said term, the same being the 21st day of December, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Adm'r'x, } No. 1597.
vs.
N. M. & S. P. R. R. Co. }

Now again come the parties and come the jury, who being called are all found present, and the trial of this cause proceeds and the evidence not being completed, the jury are by the court instructed to separate until the incoming of court tomorrow morning.

And thereafter on the sixteenth day of said term, the same being the 22nd day of December, A. D. 1892, the following, among other proceeding were had and entered of record, to wit:

MARGARET E. WALKER, Adm'r'x, } No. 1597.
vs.
N. M. & S. P. R. R. Co. }

37 Now again come the parties and come the jury, who being called, are all found present, and the trial of this cause proceeds and the evidence being completed, and the arguments of the counsel heard, the jury are by the court instructed to separate until the incoming of court tomorrow morning.

And thereafter, on the seventeenth day of said term, the same being the 23rd day of December, A. D. 1892, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Adm'*x'r*, } No. 1597.
vs.
N. M. & S. P. R. R. Co. }

Now again come the parties and come the jury, who being called, are all found present, and the trial of this cause proceeds, and the jury having received the instructions of the court retire to the consideration of their verdict, in charge of a sworn bailiff of this court.

Now again come the parties and come the jury, who being called are all found present, and return into court the following verdict, to wit:

"We, the jury in the case of M. E. Walker *vs.* New Mexico & Southern Pacific Railroad Co., find the defendant guilty, and assess the plaintiff's damages at nine thousand, two hundred and twelve dollars and fifty cents.

(Signed) LEANDRO BACA, *Presidente.*"

And the said jury also return into open court the following special findings of fact:

1. It did run.

38 2. Yes.

3. Yes.

4. No.

5. According to the rain which fell.

6. ¾ mile, more or less.

7. There is.

8. Yes.

9. West of the city of Socorro, and east of the Catholic graveyard, its banks are about two feet, its width about 60 feet, and about a mile in length, more or less.

10. Damming up the water by the railroad embankment, on account of not having a sufficient outlet for its natural course.

11. There is.

12. Flood.

13. Yes.

14. ¾ mile to main arroya, and ¼ mile to lower arroya.

15. It is level now, and in '86 it was an arroya, and there is no ditch now excepting the company drain.

16. Cloudburst.

17. As at other times.

18. That of the river was lower.

19. Yes.

20. No.

21. No answer.

21. No.

39 22. To the Socorro mountains 4 miles; and to the Magdalena mountains 18 miles.

23. More or less the same distant as in the foregoing answer.

24. If it is the embankment which runs to Magdalena it runs south of Socorro mountain and north of the Magdalena mountains, a distance of 100 yards, more or less, from the Magdalena mountains and against the Socorro mountain, and if it is the embankment which runs along the Rio Grande valley from north to south, it is 5 or 6 miles from the Socorro mountain, and about 18 or 20 miles, more or less, to the foot of the Magdalena mountains.

25. Railroad.

26. We don't know.

27. 700 yards, more or less.

(Signed) LEANDRO BACA, *Presidente.*

And now comes the defendant by its attorneys and moves the court to enter a judgment for the defendant and against the plaintiff, in accordance with the special findings of the jury in this cause.

And thereafter, at a regular term of the district court of the fifth judicial district of the Territory of New Mexico, in and for the county of Socorro, in said district, begun and held on the 1st day of May A. D. 1893, and on the sixteenth day of the said term, the same being the 18th day of May, A. D. 1893, the following among other proceedings were had and entered of record, to wit:

40 Present the Hon. A. A. Freeman, associate justice of the supreme court of the Territory of New Mexico, and judge of the fifth judicial district court thereof, presiding:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause coming on to be heard on defendant's motion for a judgment, notwithstanding the verdict of the jury herein, and the arguments of council being heard, and the court being fully advised in the premises, said motion is sustained.

Wherefore it is ordered and adjudged that plaintiff take nothing by her writ, that defendant go hence without day and recover of plaintiff its costs herein expended, to be taxed, and that execution issue therefor.

Plaintiff excepts to the ruling and judgment of the court on the ground that the special findings of the jury are not inconsistent with the general verdict, and are not sufficient to warrant a judgment in favor of defendant, and that the court ought to render judgment for the plaintiff on the general verdict.

And thereafter, on the twenty-fourth day of said term, the same being the 27th day of May, A. D., 1893, the following among other proceedings were had and entered *to* record, to wit:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

41 Now it is ordered by the court that the judgment against the plaintiff heretofore entered in this cause on the 18th day of May, 1893, be and the same is hereby set aside and vacated.

And now comes the plaintiff by her attorney, and files herein her motion for a new trial of this cause.

And thereafter, on the twenty-eighth day of said term, the same being the 1st day of June, A. D. 1893, the following among other proceedings were had and entered of record, to wit:

MARGARET E. WALKER, Adm'r'x,
vs.
N. M. & S. P. R. R. Co. } No. 1597.

This cause coming on to be heard on the plaintiff's motion for a new trial, and the arguments being heard, and the court being duly advised in the premises, doth overrule said motion; to which said ruling of the court plaintiff excepts.

Now comes the plaintiff and files a motion in arrest of judgement in favor of defendant on the special findings, and moves the court for judgment on the general verdict in favor of the plaintiff, which said motion is by the court heard and overruled, to which said ruling of the court plaintiff excepts.

Wherefore it is considered that the plaintiff take nothing by her writ, that the defendant go hence without day, and recover of the said plaintiff as administratrix of Ashael C. Walker, deceased, its costs herein, to be taxed.

42 TERRITORY OF NEW MEXICO, } ss:
Fifth Judicial District, County of Socorro, }

I, J. W. Garner, clerk of the district court of the fifth judicial district of the Territory of New Mexico, in and for the county of Socorro, do hereby certify that the foregoing is a full, true and complete copy of the record and proceedings in a case lately pending in said court, in which Margaret E. Walker, administratrix, was plaintiff, and The New Mexico and Southern Pacific Railroad Company was defendant, as the same remains of record in my office.

Witness my hand and the seal of the said district court, this 29th day of June, A. D. 1893.

J. W. GARNER,
[SEAL.] *Clerk of said District Court.*

43 And afterwards, to wit, on July 28th, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1893.

MARGARET E. WALKER, Plaintiff in Error,
vs.
THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Assignment of Errors.

Comes now the said plaintiff in error and shows to the court here that in the rulings of the district court of the fifth judicial district of the Territory of New Mexico, sitting within and for the county of Socorro in said district, in a case wherein Margaret E. Walker was plaintiff, and The New Mexico and Southern Pacific
43½ Railroad Company was defendant, there is manifest error to the prejudice of the said plaintiff in error, in this, to wit:

1. That the court erred in entering judgment in favor of the New Mexico and Southern Pacific Railroad Company on the verdict of the jury.

2. That the court erred in refusing to enter judgment in favor of plaintiff in error, Margaret E. Walker.

And the said plaintiff in error says that the said court in the rulings and decisions aforesaid and in each and every of them

erred to the manifest prejudice of this plaintiff in error, which errors the said plaintiff in error prays may be corrected and the rulings thereon reversed, and that this court may enter judgment upon the verdict in this cause in favor of the said plaintiff in error, or may remand the cause to the said district court for the purpose of entering such judgment, and for such other and further proceedings as may be necessary in the premises.

NEILL B. FIELD,
JAMES G. FITCH,
Attorneys for Plaintiff in Error.

44 And afterwards at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the last Monday of July, 1893, the same being Monday, July 31, 1893, on the fourth day of said term, the same being Thursday, August 3, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN PACIFIC Railroad Company, Def't in Error.	541. Error to District Court of Socorro County.

Now comes the said defendant, by its attorneys, W. B. Childers and H. L. Waldo, Esquires, and suggests a diminution of the record herein, and moves the court to grant it a writ of certiorari, directed to the district court in and for the county of Socorro in accordance with its motion on file, and said motion being argued by Messrs. Waldo and Childers for defendant in error and N. B. Field, Esquire, for plaintiff in error, is submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And afterwards, to wit, at the regular term of said court last aforesaid, on the fifth day thereof, the same being Friday, August 4, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN PACIFIC Railroad Company, Def't in Error.	541. Error to District Court of Socorro County.

This cause coming on for hearing upon the motion of said defendant in error for a writ of certiorari heretofore argued and submitted to the court, the court being now sufficiently advised in the premises grants said motion: It is therefore ordered by the court that said motion be, and the same hereby is, granted, and the clerk of this court is hereby directed to issue a writ of certiorari, directed to the clerk of the district court in and for the county of Socorro, to certify up to this court as part of the record in this cause, all the written interrogatories filed and submitted to the trial jury and by

said jury answered, and which said answers have been returned as part of the record in this cause.

45 And afterwards, to wit, on the 7th day of August, 1893, in obedience to the writ of certiorari issued out of this court there was filed in the office of the clerk of said court the interrogatories propounded to the trial jury in the court below; which said interrogatories are in the words and figures following, to wit:

The Territory of New Mexico to the clerk of the district court in and for the county of Socorro, Greeting:

Whereas at the suit of Margaret E. Walker suggesting to us that error has intervened in the record and proceedings, and also in the giving of a judgment, in a certain action which was lately pending in said district court, wherein Margaret E. Walker was plaintiff and The New Mexico and Southern Pacific Company was defendant, we heretofore commanded you that if judgment thereon was given, then, without delay, you should send to us, under the seal of your court, distinctly and openly an authenticated transcript of the record and proceedings aforesaid, with all things concerning the same, so that we might have them in our supreme court on the last Monday of July, 1893; and now in behalf of the said The New Mexico and Southern Pacific Railroad Company it is shown to us that though you may have sent to us in our said supreme court at the time aforesaid an authenticated transcript aforesaid in some part thereof, yet other parts of the same and also other things touching them still remain before you to be sent, to wit, all the written interrogatories filed and submitted to the trial jury and by said jury answered, and which said answers have been returned as part of the record in this case:

Therefore we command you that without delay you send to us, under the seal of this court, distinctly a transcript of the record of said interrogatories and also all things touching them, as *is* before *said* remain before you to be sent, and this writ, so that, having the same in our said supreme court, we may cause to be done thereupon what of right and according to the laws of the land ought to be done.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court this 4th day of August, 1893.

[SEAL.] H. S. CLANCY, *Clerk.*

46 M. E. WALKER
vs.
N. M. & S. P. Co.

(If the jury find for plaintiffs they must answer these questions.
(Signed) A. A. F.)

erred to the manifest prejudice of this plaintiff in error, which errors the said plaintiff in error prays may be corrected and the rulings thereon reversed, and that this court may enter judgment upon the verdict in this cause in favor of the said plaintiff in error, or may remand the cause to the said district court for the purpose of entering such judgment, and for such other and further proceedings as may be necessary in the premises.

NEILL B. FIELD,
JAMES G. FITCH,
Attorneys for Plaintiff in Error.

44 And afterwards at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the last Monday of July, 1893, the same being Monday, July 31, 1893, on the fourth day of said term, the same being Thursday, August 3, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Def't in Error.	541. Error to District Court of Socorro County.

Now comes the said defendant, by its attorneys, W. B. Childers and H. L. Waldo, Esquires, and suggests a diminution of the record herein, and moves the court to grant it a writ of certiorari, directed to the district court in and for the county of Socorro in accordance with its motion on file, and said motion being argued by Messrs. Waldo and Childers for defendant in error and N. B. Field, Esquire, for plaintiff in error, is submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And afterwards, to wit, at the regular term of said court last aforesaid, on the fifth day thereof, the same being Friday, August 4, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Def't in Error.	541. Error to District Court of Socorro County.

This cause coming on for hearing upon the motion of said defendant in error for a writ of certiorari heretofore argued and submitted to the court, the court being now sufficiently advised in the premises grants said motion: It is therefore ordered by the court that said motion be, and the same hereby is, granted, and the clerk of this court is hereby directed to issue a writ of certiorari, directed to the clerk of the district court in and for the county of Socorro, to certify up to this court as part of the record in this cause, all the written interrogatories filed and submitted to the trial jury and by

said jury answered, and which said answers have been returned as part of the record in this cause.

45 And afterwards, to wit, on the 7th day of August, 1893, in obedience to the writ of certiorari issued out of this court there was filed in the office of the clerk of said court the interrogatories propounded to the trial jury in the court below; which said interrogatories are in the words and figures following, to wit:

The Territory of New Mexico to the clerk of the district court in and for the county of Socorro, Greeting:

Whereas at the suit of Margaret E. Walker suggesting to us that error has intervened in the record and proceedings, and also in the giving of a judgment, in a certain action which was lately pending in said district court, wherein Margaret E. Walker was plaintiff and The New Mexico and Southern Pacific Company was defendant, we heretofore commanded you that if judgment thereon was given, then, without delay, you should send to us, under the seal of your court, distinctly and openly an authenticated transcript of the record and proceedings aforesaid, with all things concerning the same, so that we might have them in our supreme court on the last Monday of July, 1893; and now in behalf of the said The New Mexico and Southern Pacific Railroad Company it is shown to us that though you may have sent to us in our said supreme court at the time aforesaid an authenticated transcript aforesaid in some part thereof, yet other parts of the same and also other things touching them still remain before you to be sent, to wit, all the written interrogatories filed and submitted to the trial jury and by said jury answered, and which said answers have been returned as part of the record in this case:

Therefore we command you that without delay you send to us, under the seal of this court, distinctly a transcript of the record of said interrogatories and also all things touching them, as *is* before *said* remain before you to be sent, and this writ, so that, having the same in our said supreme court, we may cause to be done thereupon what of right and according to the laws of the land ought to be done.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court this 4th day of August, 1893.

[SEAL.] H. S. CLANCY, *Clerk.*

46 M. E. WALKER
vs.
N. M. & S. P. Co.

(If the jury find for plaintiffs they must answer these questions.
(Signed) A. A. F.)

Special Findings Asked by the Defendant.

1 Q. At the time of the injury complained of, did any water flow or run over plaintiff's land, except the water which fell from the clouds as rain?

2 Q. Was there a cloudburst in the Magdalena or Socorro mountains on September 8th, 1886; and if so, was the water therefrom the water which ran over plaintiff's land?

3 Q. Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8th, 1886, surface water?

4 Q. Was it customary for water to collect and stand on plaintiff's land and land in the immediate vicinity thereof in the time of heavy rains or floods?

5 Q. How often upon an average in any one year did the water come down the arroyos leading towards the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8th, 1886?

6 Q. How far is the mouth of the main arroyo which runs th-ough the western part of the city of Socorro in a northerly direction from the main line of the railroad?

7 Q. Is there any well-defined water channel east of the acequia madre of Socorro toward the main line of the railroad, except the ditch of the New Mexico Town Company and the acequia between said ditch and the main line of the railroad?

8 Q. Does the railroad of the defendant cross any arroyo leading from the Magdalena or Socorro mountains at any place north of the Magdalena branch of the New Mexican Railroad Company at its junction with the main line one and a half miles?

9 Q. If you state in answer to the last question that there was an arroyo, state where it is, its length, breadth, and the height of its banks.

10 Q. If you find the defendant has damaged plaintiff's lands and property, state how, and how much, and give each item, and the amounts. State fully.

11 Q. Do you find any more of a water-course on plaintiff's land or in the immediate vicinity thereof than what is to be seen upon any of the bottom of valley lands north of the Magdalena branch one and a half miles and west of the railroad track?

12 Q. If there was any water dammed up was it waters coming from rains or floods?

47 13 Q. If there was any water dammed up, was it not dammed up by the embankment of the Magdalena branch of the New Mexican Railroad Company?

14 Q. How far from the main line of the railroad in a westerly direction are the mouths of the arroyos testified to by the witnesses?

15 Q. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad? Is it level or sloping, and for what purposes was it used in 1886?

16 Q. Was the water which came down from the mountains on

the day that the damage was done to plaintiff, caused by a cloudburst or by ordinary rains?

17 Q. Was the flood which destroyed plaintiff's house an ordinary flow of water or was it extraordinary and unprecedented in its character?

18 Q. Was the water overflowing the Rio Grande on the east side of the railroad track as high as it was on the west side of the railroad track at the time plaintiff's property was damaged?

19 Q. If you answer that there was a cloudburst in the Magdalena and Socorro mountains and the water coming down the arroyos was extraordinary in its character, state whether or not the waters flowing in the main arroyo west of the city of Socorro overflowed and broke through the east bank of said arroyo at the west end of Spring street, in the city of Socorro, and then passed in an easterly direction in great volumes down Spring and other streets in said city to the low bottom lands immediately west of defendant's railroad.

20 Q. State whether or not the lands west of the railroad track as far as the Town Company ditch are low bottom lands liable to overflows in time of high water from the Rio Grande.

21 Q. If you state yes to the last question, state whether or not the Rio Grande at the time of the damage to plaintiff's property was overflowing its banks and level with the cross-ties of the embankment of the railroad.

21½ Q. If you say yes to the last question, state whether or not, if there had been no railroad embankment, the water overflowing from the Rio Grande would have overflowed the low lands where was situate the plaintiff's property.

22 Q. How far is it from the mouths of the arroyos, testified to by the witnesses to the Magdalena and Socorro mountains?

23 Q. How far is it from plaintiff's property to the Magdalena or Socorro mountains?

24 Q. How far is it from the railroad embankment to the Magdalena or Socorro mountains?

48 25 Q. Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water?

26 Q. State when the arroya running down Spring street, in the southern portion of the city of Socorro, was made.

27 Q. If you state that the waters coming down the arroya through the western portion of the city of Socorro overflowed and broke through the banks of said arroya at or near the western end of Spring street, state how far it is from the point of overflow at or near the western end of Spring street to the main line of the railroad.

TERRITORY OF NEW MEXICO, } ss:
Fifth Judicial District, County of Socorro, }

I, J. W. Garner, clerk of the district court of the fifth judicial district of the Territory of New Mexico, within and for the county of

Socorro, do hereby certify that the above and foregoing is a full, true, and correct transcript of the written interrogatories filed in my office December 23rd, 1892, and submitted to the trial jury in a cause lately pending in said district court, wherein Margaret E. Walker, administratrix, was plaintiff and The New Mexico and Southern Pacific Railroad Company was defendant, as the same remain in the files of said cause in my office.

In testimony whereof I do hereunto set my hand and the seal of said district court this 5th day of August, A. D. 1893.

J. W. GARNER,
Clerk of said District Court.

[SEAL.]

49 And afterwards, to wit, at the regular term of said court last aforesaid and on the fourteenth day thereof, the same being Wednesday, August 16th, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN Pacific Railroad Company, Def't in Error.	541.	Error to District Court of Socorro County.

This cause coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel on file, is argued by N. B. Field, Esquire, for plaintiff in error and W. B. Chileders, Esquire, for defendant in error, and submitted to the court; and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, at the regular term of said court last aforesaid and on the twenty-third day thereof, the same being Saturday, August 26, 1893, the following, among other, proceedings were had, to wit:

MARGARET E. WALKER, Pl'ff in Error, *vs.* THE NEW MEXICO AND SOUTHERN Pacific Railroad Company, Def't in Error.	541.	Error to District Court of Socorro County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Fall, Chief Justice O'Brien and Associate Justices Seeds and Lee concurring, affirming the judgment of the court below. It is therefore considered and adjudged by the court that the judgment of the district court in said cause be, and the same is hereby, affirmed, and that in accordance therewith the said The New Mexico and Southern Pacific Railroad Company go hence without day and recover of said Mar-

garet E. Walker, administratrix, its costs in this behalf expended as well in the court below as in this court, to be taxed, and that it have execution therefor.

50 And heretofore, to wit, on the 26th day of August, 1893, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, at the July, 1893, Term.

MARGARET E. WALKER, Plaintiff in Error,
vs.
THE NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

FALL, *A. J.*:

Plaintiff in error sued defendant for damages for injury to real property caused by defendant's railroad embankment stopping or obstructing natural or artificial channels through which water was accustomed to flow, thereby overflowing and damaging plaintiff's land.

General verdict was for plaintiff, but upon answers to special questions propounded the court set aside verdict and entered judgment for defendant.

Two errors are assigned:

1st. That the court erred in entering judgment in favor of the defendant on the verdict of the jury.

2nd. That the court erred in refusing to enter judgment in favor of plaintiff in error.

If the act of the territorial legislature of 1889 is constitutional, then we can find no error in the action of the court in setting aside the general verdict and entering judgment upon the special findings.

But it is contended strongly that the act referred to is unconstitutional, in that it is in conflict with article seven of the amendments to the Constitution of the United States.

The act of 1889 is as follows:

"SEC. 1. In all trials by jury in the district courts the court shall, at the request of the parties, or either of them, or their counsel, in addition to the general verdict direct the jury to find upon particular questions of fact to be stated in writing by the party or parties requesting the same."

"SEC. 2. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Mr. Justice Miller in his "Lectures on Constitutional Law," 493, speaking of article 7 of the amendment, says:

51 "This article of the amendments to the Constitution * * * applies to the powers exercised by the Govern-

ment of the United States and not to those of the States;" and, as further stated by the same eminent writer, this has been repeatedly decided.

Livingston *vs.* Moon, 7 Peters, 469.
The Justices *vs.* Murray, 9 Wall., 274.
Edwards *vs.* Elliott, 21 Wall., 532.
Fox *vs.* Ohio, 5 Howard, 434.

Our territorial courts are not constitutional courts "in which the judicial power conferred by the Constitution on the General Government can be deposited." Miller on the Constitution of the United States, 369.

McAllister *vs.* United States, 141 U. S.
Am. Ins. Co. *vs.* Canter, 1 Pet., 511–546.
Clinton *vs.* Englebrecht, 13 Wall., 434.

The powers of the territorial legislatures are nearly as extensive as those exercised by State legislatures (Hornbuckle *vs.* Toombs, 18 Wall., 654); and, indeed, if this article prohibits such legislation by a territory, the prohibition applies equally to State legislation.

We are clearly of the opinion that the act of 1889 was passed by the legislature in the legal and constitutional exercise of its powers and is within the "law of the land."

It might be well to add that we think the act should be so construed as to enable the court in its discretion to refuse to submit questions not regarded as material; and, further, to refuse to set aside a verdict if it is possible to reconcile the special findings with the same. It should also refuse to set aside the general verdict unless the special findings upon all the material facts in issue construed together cannot be reconciled with it.

The judgment below is affirmed.

ALBERT B. FALL, *A. J.*

We concur:

EDWARD P. SEEDS, *A. J.*
JAMES O'BRIEN, *C. J.*

Wm. D. Lee concurs in the result reached in the foregoing opinion.

52 UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, H. S. Clancy, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

Seal Supreme Court Territory of New Mexico.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this 25th day of August, 1894.

H. S. CLANCY, *Clerk.*

53 In the Supreme Court of the United States, at the October Term, A. D. 1894.

MARGARET E. WALKER, Plaintiff in Error,
vs.
THE NEW MEXICO & SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Comes now the plaintiff in error, by her attorney, and shows to the court that in the rulings of the district court of the fifth judicial district of the Territory of New Mexico, sitting within and for the county of Socorro, in said district, and in the rulings of the supreme court of the Territory of New Mexico, in a case wherein Margaret E. Walker was plaintiff and The New Mexico and Southern Pacific Railroad Company was defendant, there was and is manifest error to the prejudice of the plaintiff in error in this, to wit:

1st. That the said district court erred in entering judgment in favor of the New Mexico and Southern Pacific Railroad Company on the special findings of the jury in said cause.

2d. That the said district court erred in refusing to enter judgment in favor of the said plaintiff in error, Margaret E. Walker, upon the general verdict of the jury in this cause.

3d. That the said supreme court erred in affirming the judgment of the said district court.

And the plaintiff in error says that in the said rulings and decisions, and in each and every of them, there was and is manifest error to the prejudice of this plaintiff in error; which errors the said plaintiff in error prays may be corrected and the rulings thereon reversed, and that this cause may be remanded to the court whence it came, and that this plaintiff in error may be restored to all things which she has lost by reason thereof.

NEILL B. FIELD,
Att'y for Plaintiff in Error.

Endorsed on cover: Case No. 15,687. New Mexico Terr'y supreme court. Term No., 171. Margaret E. Walker, plaintiff in error, *vs.* The New Mexico & Southern Pacific Railroad Company. Filed September 21st, 1894.

165-593

Supreme Court, U. S.
FILED.
JAN 18 1897
JAMES H. McKENNEY,
CLERK.

165-593

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1896.

No. 171.

MARGARET E. WALKER,
Plaintiff in Error,

vs.

NEW MEXICO & SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

JAMES G. FITCH,
NEILL B. FIELD.
Counsel for Plaintiff in Error.

CITIZEN PRINT, ALBUQUERQUE, N. M.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1896.

No. 171.

MARGARET E. WALKER,
Plaintiff in Error,

vs.

NEW MEXICO & SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

JAMES G. FITCH,
NEILL B. FIELD,
Counsel for Plaintiff in Error.

CITIZEN PRINT, ALBUQUERQUE, N. M.

STATEMENT.

This was an action on the case to recover damages for injuries to real property, alleged to have been caused by the wrongful construction by the defendant in error of a railroad embankment along and across natural and artificial water-courses, through which the waters of the Socorro and Magdalena mountains had been, from time immemorial, accustomed to flow into the Rio Grande, whereby those waters overflowed the lands of the plaintiff in error and destroyed property of great value.

The original declaration in the case, to which a demurrer was interposed, alleged that the waters which caused the injuries were surface waters, and that the embankment of the defendant in error "did dam up, cut up and close up all of the natural and usual outlets and places where the surface water aforesaid had been accustomed to flow to reach their depositing place, the Rio Grande River." The demurrer was sustained, and thereafter an amended declaration was filed, which counted upon the wrongful act of the defendant in error in obstructing natural and artificial water-courses which it was alleged had from time immemorial been accustomed to carry the water from the north and west of the premises of the plaintiff in error, and from the Socorro and Magdalena mountains, into the Rio Grande. The amended declaration does not characterize the water which caused the in-

jury as surface water, or otherwise than as the water from the Magdalena and Socorro mountains, and from the country to the north and west of the lands and premises of the plaintiff in error. This amended declaration was demurred to upon the ground, among others, that it appeared from the declaration that the alleged grievances and grounds of damages therein set forth were merely the result of the natural flow of surface water. The demurrer was overruled, and thereupon a plea of the general issue was filed. The cause was tried to a jury which returned the following verdict: "We, the jury, in the case of Margaret E. Walker against the New Mexico and Southern Pacific Railroad Company find the defendant guilty, and assess the plaintiff's damages at $9,212.50. Leandro Baca, President." At the instance of counsel for the defendant in error, and under the provision of an act of the legislature of New Mexico, twenty-eight special questions were propounded to the jury, and twenty-seven of them were answered. The act of the legislature of New Mexico, under which these questions were propounded to, and answered by, the jury, is as follows:

"Section 1. In all trials by jury in the different courts, the court shall at the the request of the parties, or either of them, or their counsel, in addition to the general verdict, direct the jury to find upon particular questions (of) or fact to be stated in writing by the party or parties requesting the same.

"Section 2. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

(Laws of 1889, p. 97.)

The questions and answers are as follows:

"1. Q. At the time of the injury complained of did any of the water flow or run over the plaintiff's

land, except the water which fell from the clouds as rain?

"A. It did run.

"2. Q. Was there a cloud-burst in the Magdalena or Socorro mountains on September 8, 1886; and if so, was the water therefrom the water which ran over plaintiff's land?

"A. Yes.

"3. Q. Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, surface water?

"A. Yes.

"4. Q. Was it customary for water to collect and stand on plaintiff's land, and land in the immediate vicinity thereof, in the times of heavy rains or floods?

"A. No.

"5. Q. How often upon an average in any one year did the water come down the arroyos leading toward the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8, 1886?

"A. According to the rain which fell.

"6. Q. How far is the mouth of the main arroyo which runs through the western part of the city of Socorro in a northerly direction from the main line of the railroad?

"A. Three-quarters of a mile, more or less.

"7. Q. Is there any well defined water channel east of the Acequia Madre of Socorro towards the main line of the railroad, except the ditch of the N. M. Town Co., and the acequia between said ditch and the main line of the railroad?

"A. There is.

"8. Q. Does the railroad of the defendant cross any arroyo leading from the Magdalena or Socorro mountains at any place north of the Magdalena branch of the New Mexican Railroad Co., at its junction with the main line one and one-half miles?

"A. Yes.

"9. Q. If you state in answer to the last question that there was such an arroyo, state where it is, its length, breadth, and the height of its banks.

"A. West of the city of Socorro and east of the Catholic graveyard; its banks are about two feet, its

width about sixty feet, and about a mile in length more or less.

"10. Q. If you find the defendant has damaged plaintiff's land and property, state how, and how much, and give each item with amounts; state fully.

"A. Damming up the water by the railroad embankment, on account of not having a sufficient outlet for its natural course.

"11. Q. Do you find any more of a water course on plaintiff's land or in the immediate vicinity thereof than what is to be seen upon any of the bottom or valley lands north of the Magdalena branch one and one-half miles, and west of the rai'road track?

"A. There is.

"12. Q. If there was any water dammed up, was it waters coming from rains or floods?

"A. Floods.

"13. Q. If there was any water dammed up, was it not dammed up by the embankment of the Magdalena branch of the New Mexican Railroad Co.?

"A. Yes.

"14. Q. How far from the main line of the railroad, in a westerly direction, are the mouths of the arroyos testified to by the witnesses?

"A. Three-quarters of a mile to main arroyo, and one-quarter of a mile to lower arroyo.

"15. Q. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad; is it level or sloping, and for what purposes was it used in 1886?

"A. It is level now, and in 1886 it was an arroyo, and there is no ditch now, excepting the company drain.

"16. Q. Was the water which came down from the mountains on the day of the damage done to plaintiff caused by a cloud-burst or by ordinary rains?

"A. Cloud-bursts.

"17. Q. Was the flood which destroyed plaintiff's house an ordinary flow of water, or was it extraordinary and unprecedented in its character?

"A. As at other times.

"18. Q. Was the water overflowing the Rio Grande on the east side of the railroad track as high as it was on the west side of the railroad track at the time plaintiff's property was damaged?

"A. That of the river was lower.

"19. Q. If you answer that there was a cloud-burst in the Magdalena and Socorro mountains and the water coming down the arroyos was extraordinary in its character, state whether or not the waters flowing in the main arroyo west of the city of Socorro overflowed and broke through the east bank of said arroyo at the west end of Spring street, in the city of Socorro, and then passed in an easterly direction in great volumes down Spring and other streets in said city to the low bottom lands immediately west of defendant's railroad?

"A. Yes.

"20. Q. State whether or not the lands west of the rai road track as far as the town company ditch are low bottom lands liable to overflow in time of high water from the Rio Grande?

"A. No.

"21. Q. If you state "yes" to the last question, state whether or not the Rio Grande, at the time of the damage to the plaintiff's property, was overflowing its banks and level with the cross-ties on the embankment of the railroad.

"No answer.

"21½. Q. If you say yes to the last question, state whether or not if there had been no railroad embankment the water overflowing from the Rio Grande would have overflowed the low lands where was situate the plaintiff's property.

"A. No.

"22. Q. How far is it from the mouths of the arroyos testified to by the witnesses to the Magdalena and Socorro mountains?

"A. To the Socorro mountains four miles, and to the Magdalena mountains eighteen miles.

"23. Q. How far is it from plaintiff's property to the Socorro or Magdalena mountains.

"A. More or less, the same distance as in the foregoing answer.

"24. Q. How far is it from the railroad embankment to the Socorro or Magdalena mountains?

"A. If it is the embankment which runs to Magdalena, it runs sonth of Socorro mountains and north of the Magdalena mountains a distance of 100 yards, more or less, from the Magdalena mountains and

against the Socorro mountains, and if it is the embankment which runs along the Rio Grande valley from north to south, it is five or six miles from the Socorro mountains and about eighteen or twenty miles, more or less from, to the foot of the Magdalena mountains.

"25. Q. Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water.

"A. Railroad.

"26. Q. State when the arroyo running down Spring street in the southern portion of the city of Socorro was made?

"A. We don't know.

"27. Q. If you state that the waters coming down the arroyo through the western portion of the city of Socorro overflowed and broke through the banks of said arroyo at or near the western end of Spring street, state how far it is from the point of overflow at or near the western end of Spring street to the main line of the railroad?

"A. Seven hundred yards, more or less."

Upon the coming in of this general verdict and the special findings, the defendant in error moved the court for a judgment in its favor on the special findings, upon the ground that the special findings were in conflict with the general verdict; and the plaintiff in error moved the court for a judgment on the general verdict. The motion of the defendant in error was sustained, and the motion of the plaintiff in error was overruled. Judgment being entered in favor of the defendant in error on the special findings of the jury, she took the case on error to the supreme court of the Territory of New Mexico, which court having affirmed the judgment of the district court, the case is brought here by writ of error.

The plaintiff in error assigns the following errors:

1. That the said district court erred in entering judgment in favor of said New Mexico and Southern Pacific Railroad Company on the special findings of the jury in said cause.

2. Said district court erred in refusing to enter judgment in favor of the plaintiff in error, Margaret E. Walker, upon the general verdict of the jury in the cause.

3. Said supreme court erred in affirming the judgment of the district court.

It is insisted by plaintiff in error, that the act of the legislature of the Territory of New Mexico, authorizing special findings of fact and a general verdict in the same case, and providing that judgment shall be rendered on the special findings if they be inconsistent with the general verdict, is in contravention of the seventh amendment to the constitution of the United States. It is insisted further, even though the act of the legislature of New Mexico be not in contravention of the seventh amendment to the constitution of the United States, yet that there is no such conflict between the special findings and the general verdict in this case, as authorized or required the rendition of a judgment in favor of the defendant in error on the special findings, in disregard of the general verdict. It is further insisted, that if the special findings are inconsistent with the general verdict they are also inconsistent with each other to such an extent that they neutralize each other.

We shall endeavor to establish the following propositions:

First. That the act of the legislature is unconstitutional and void.

Second. That even if there be no valid objection to the legislation there is no such conflict between the general verdict, and the special findings as authorized a judgment contrary to the general verdict.

Third. That if there be a conflict between the special findings and the general verdict, the special findings are so inconsistent with each other that they neutralize and destroy themselves.

FIRST PROPOSITION.

The act of the Legislature is unconstitutional and void.

It will be convenient to consider each of our principal propositions under several sub-heads, as hereinafter appears.

I.

The seventh amendment to the Constitution of the United States is in force in the Territory of New Mexico.

The organic act of the Territory provides, in section 7, "that the legislative power shall extend to all rightful subjects of legislation consistent with the Constitution of the United States," while section 17 provides that the "Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect in the said Territory of New Mexico as elsewhere in the United States."

9th U. S. Statutes, 447.
Webster vs. Reid, 52 U. S. 437.
In re Attorney General, 2 New Mexico, 58.
Territory vs. Baca, 30 Pac. Rep., 864.
Bradford vs. Territory, 34 Pac. Rep., 66.

II.

The Territorial Statutes, authorizing special findings and a general verdict in the same case, and providing for judgment on the special findings if inconsistent with the general verdict, is in contravention of the seventh amendment to the Constitution of the United States.

The trial by jury, which is preserved by the seventh amendment to the Constitution, is the jury trial as it

was known at the time of the adoption of that amendment. It is not contended, although the English authorities would appear to warrant the contention, that at the common law the judge might not require the jury to answer special questions, or interrogate the jury as to the grounds upon which their general verdict was found; but it is most earnestly contended that the extent of the power of the judge, if in his opinion the special findings or answers of the jury to interrogatories were inconsistent with the general verdict, was to set aside the general verdict and award a *venire de novo*, while under this statute authority is attempted to be conferred upon the judge to render final judgment upon the special findings.

Any statute which so far modifies the functions of court and jury as to take away from the jury powers which it possessed, or to confer upon the judge powers which he did not possess, at the time of the adoption of the Constitution, is, to the extent of the change, destructive of the right to trial by jury guaranteed by the seventh amendment.

Copp vs. Henniker, 55 New Hampshire, 179.

III.

The authority attempted to be conferred upon the Judge to determine whether or not the special findings of fact are inconsistent with the general verdict, and to render judgment upon the special findings if such inconsistency is found to exist, is an attempt to confer power to re-examine facts found by a jury, otherwise than according to the rules of the common law.

Two modes only were known to the common law by which to re-examine facts found by a jury in the trial of a common law action. They were, the granting of a new trial by the Court where the issue was

tried, or to which the record was returnable, and, secondly, the awarding of a *venire facias de novo* by the appellate court for some error of law which intervened in the proceedings.

Parsons vs. Bedford, 3 Peters, 433.
Insurance Co. vs. Comstock, 16 Wallace, 258.

IV.

It is said that where the case is tried upon the general issue, the court cannot, except by consent of the parties, submit a particular question to the jury to be answered and returned with their general verdict.

We find it unnecessary to contend for the proposition thus broadly stated. While this is probably the rule in England, we find that from an early day the courts of the New England states adopted the practice of interrogating juries as to the grounds upon which the general verdict was rendered; but the answers, when thus obtained, were never permitted to control the general verdict,—that is, no final judgment contrary to the general verdict was ever entered;—but if it appeared from the answers that the case had not been fairly tried, a new trial was granted. The answers also frequently served to cure irregularities in the proceedings, and to eliminate matters which had been the subject of controversy at the trial, but which were shown by the answers of the jury to be immaterial.

The Mayor, etc., vs. Clark, 3 Ad. & El., 241.
Walker vs. Sawyer, 13 N. H., 191.
Johnson vs. Haverhill, 35 N. H., 87.
Hix vs. Drury, 5 Pick., 302.
Lawler vs. Earle, 5 Allen (Mass.), 22.
Smith vs. Putney, 18 Me., 87.
Gordon vs. Wilkins, 20 Me., 134.

Walker vs. Bailey, 65 Me., 354.
Dearborn vs. Newhall, 63 N. H., 301.
Mair vs. Bassett, 117 Mass., 356.
Spur vs. Shelburne, 131 Mass., 429.

V.

The special findings of fact authorized by this statute are very different from a special verdict.

It it is well said by the Supreme Court of Illinois that "It is manifest, of course, that a special finding by a jury upon material questions of fact submitted to them, under the provisions of the statute, is not a special verdict but an essentially different proceeding * * * * * but, while this is so, much light in relation to special findings upon questions of fact and their office and objects may be derived from the rules applicable to special verdicts."

Where a special verdict is rendered all the facts essential to entitle the party to judgment must be found.

Chicago, etc., R. R. vs. Dunlavey, 129 Ill., 143.
Geekie vs. Kirby Carpenter Co., 106 U. S., 379.
Hodges vs. Easton, 106 U. S., 408.
Ward vs. Cochran, 150 U. S., 597.

VI.

Upon the record as it stood in the court below, that court had no power to render final judgment in favor of the defendant in error. It could only enter judgment upon the general verdict, or grant a new trial.

The defendant in error did not ask for a new trial, but it asked for a judgment, as the record states, "for the defendant and against the plaintiff, in accordance with the special findings of the jury in this case." (Trans. p. 21.)

The record recites (Trans. p. 22.) "This cause coming on to be heard, upon the defendant's motion for judgment, *notwithstanding the verdict of the jury herein*, and the arguments of counsel being heard, and the Court being fully advised in the premises, said motion is sustained." It is apparent that this is a mere clerical error. The motion was for judgment on the special findings, and the court granted that motion. We insist that we have a right to claim in this court, as we claimed in the supreme court of the Territory, that judgment should have been rendered in the court below upon the general verdict in favor of the plaintiff in error.

There is not enough in the special findings, construed most favorably to it, to warrant a judgment in favor of the defendant in error.

Baylis vs. Trav. Ins. Co., 113 U. S. 316.
Hodges vs. Easton, 106 U. S., 408.
Ward vs. Cochran, 150 U. S., 597.

VII.

This statute is something more than a mere regulation of procedure.

It is a fact, not without significance, that the Federal courts have almost uniformly refused to submit special findings to juries in cases where general verdicts were to be rendered. This Court has said, sustaining the refusal of the lower court to submit special questions to a jury: "But where it (a state statute) prescribes the manner in which the judge shall discharge his duty in charging the jury, * * * * * * or that he shall require the jury to answer special interrogatories, in addition to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the act of Congress and have no application to the courts of the United States."

Indianapolis, etc., R. R. Co. vs. Horst, 93 U. S., 291.
Mut. Accident Ass'n vs. Barry, 131 U. S., 100.
Lincoln vs. Power, 151 U. S., 436.

SECOND PROPOSITION.

Even if there be no valid objection to the legislation, there is no such conflict between the general verdict and the special findings as authorized a judgment contrary to the general verdict.

The supreme court of the Territory of New Mexico based its affirmance of the judgment of the district court entirely upon the proposition that the seventh amendment to the Constitution of the United States is not in force in the Territory of New Mexico. We submit, that though it may be held that the seventh amendment to the Constitution is not in force in the Territory of New Mexico, yet there is manifest error in this record demanding the reversal of the judgment.

The theory of the defendant in error, which appears to have been sustained by the trial court and by the supreme court of the Territory, is that, if it be established that the water which caused the injury was surface water, there could be no liability on the part of the defendant, although it was also established that the embankment of the defendant in error prevented this water from finding its natural outlet and backed up upon the land of the plaintiff in error.

It has been argued that the special findings of the jury in this case show that there was a cloud-burst in the Magdalena mountains on the 8th day of September, 1886; that this cloud-burst caused an unusual and unprecedented flow of water into and through the arroyos, referred to in the special findings, and the mouths or outlets of these arroyos were a great dis-

tance from the embankment of the defendant in error, from a quarter of a mile to three-quarters of a mile away. We insist that the special findings do not support this contention; but if these facts are found by the jury, they are not ultimate facts upon which the right of recovery by the plaintiff in error depends, but are merely probative facts, the weight of which, when established, was for the jury alone, and when taken in connection with the other facts found by the jury, viz: that waters, other than surface waters, contributed to the injury, that a water-course was obstructed by the embankment of the defendant in error and the injury thereby directly caused, and that the flood which caused the injury was not unusual, there is no inconsistency between the special findings and the general verdict.

I

Where special findings can on any reasonable hypothesis be reconciled with the general verdict, the latter will control.

A general verdict inconsistent with a portion of the special findings must stand, unless on the face of the record, without looking to the evidence, the special findings taken as a whole are so inconsistent with the general verdict that both cannot stand together. Every reasonable presumption, however, must be indulged in favor of the general verdict.

Louisville, etc., R. R. Co. vs. Sumner, 30 N. E. R., 873.
Lauderbach vs. Rouch, 31 N. E. R., 578.
Peninsula, etc., R. R. Co. vs. Franklin Ins. Co., 14 S. E. R., 237.
Shafner vs. Cover, 28 N. E. R., 871.
Bloak vs Haseltine, 29 N. E. R., 937.
Shoner vs. Pennsylvania Co., 28 N. E. Rep., 616.
Starrett vs. Gault, 62 Ill. App., 209.

II.

The special findings of the jury are not inconsistent with the general verdict in this case.

Even though the waters which caused the injury to the plaintiff in error came from the clouds as rain and were produced by a cloud-burst in the Magdalena mountains, this fact would not preclude a recovery by the plaintiff in error unless two other facts are established: *First*, that cloud-bursts in that vicinity were unusual; and, *Second*, that no natural or artificial water-course, through which these waters were accustomed to find an outlet, had been obstructed by the defendant in error.

The rule which authorizes the owner of land to receive or reject the surface waters accustomed to flow from higher ground, is subject to an important qualification which appears to be entirely ignored by counsel for defendant in error in attempting to construe the special findings in this case. That qualification is well expressed to be, "where water, owing to the hilly or mountainous condition of the country, accumulates in large quantities from the rain and melting snow, and at regular seasons descends through long gulleys or ravines, and in its flow carves a distinct and well defined channel which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such stream is considered a water-course."

Simmons vs. Winters, 21 Oregon, 35.
Earle vs. DeHart, 12 N. J. Eq., 280.
Palmer vs. Waddell, 22 Kan., 248.
Rhoades vs. Davidheiser, 133 Pa. St., 226.
Conniff vs. San Francisco, 67 Cal., 45.
McClure vs. Redwing, 28 Minn., 186.
Howard vs. Ingersoll, 13 How., 427.

III.

Whether or not there was a water-course obstructed by the embankment of the defendant in error, was a question of fact for the jury.

There is no bill of exceptions to bring before this Court the evidence on which the parties relied to maintain their respective contentions. The jury distinctly found (see answer to question 11), that there was a water-course in the vicinity of plaintiff's land, and also found (see answers to questions 8 and 10), that this water-course was obstructed by the embankment of the defendant in error. We submit that it was for the jury to say from the evidence whether or not a water-course was obstructed.

Eulrich vs. Richter, 37 Wis., 226.

THIRD PROPOSITION.

If there be a conflict between the special findings and the general verdict, the special findings are so inconsistent with each other that they neutralize and destroy themselves.

It is difficult, if not impossible, to see the materiality of many of the special questions; indeed, it may be asserted with confidence that the special findings are not such as to enable the Court to say from an examination of the pleadings and the special findings, in whose favor judgment should go. We call special attention to the fact, that of the 28 questions submitted to the jury, only the first, third, seventh, eighth, eleventh and seventeenth were so framed as to obtain from the jury findings upon ultimate facts material to the controversy. All the other questions sought to obtain the opinion of the jury upon merely probative facts, the weight of which, when established, was for the jury alone.

In answer to the first interrogatory propounded, the jury found that water, other than water which fell from the clouds as rain, flowed and ran over the plaintiff's land at the time of the injury.

The answer to the third interrogatory is, that the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, was surface water.

The answer to the seventh interrogatory is, that there is a well defined water-channel east of the Acequia Madre of Socorro towards the main line of the railroad, other than the ditch of the New Mexico Town Company and the acequia between said ditch and the main line of the railroad; while the answer to the eighth interrogatory is, that the defendant's railroad crosses an arroyo leading from the Magdalena and Socorro mountains at some place north of the Magdalena branch of the New Mexican road at its junction with the main line one and one-half miles.

The answer to the eleventh interrogatory is, in effect, that there is a well-defined water-course on the plaintiff's land, or in its immediate vicinity; and the effect of the answer to the seventeenth interrogatory is, that the flow of water which destroyed the plaintiff's property was not unusual or extraordinary.

In the court below it was contended by counsel for defendant in error that the answers of the jury to questions 2, 3, 5, 12 and 14 were inconsistent with the general verdict, but an examination of those questions and answers will show that no one of the questions was directed to obtain a finding from the jury as to any ultimate fact; the facts found by the jury in answer to these particular questions being of more or less probative force, and being entitled to greater or less weight, dependent upon the view which the jury might take of other facts proved on the trial; for instance, the fact that there was a cloud-burst in the Magdalena mountains could not in any manner affect

the right of the plaintiff to recover, if it were shown that cloud-bursts of similar character were of frequent occurrence in that vicinity; nor would the fact that the water which did the injury was surface water, preclude the plaintiff's right to recover if it were shown that the conformation of the country was such that plaintiff was entitled to have that surface water flow through a particular channel. The answer to the fifth interrogatory, taken in connection with the answer to the seventeenth, certainly shows that there was nothing extraordinary about this particular flow of water.

But, if there is any inconsistency between the general verdict and the special findings, there is the same inconsistency between the several special findings. We think the special findings are reconcilable with the general verdict and with each other, but we do insist that any construction of the special findings which brings them into conflict with the general verdict, destroys their force, for the reason that such construction creates irreconcilable conflict among the the special findings themselves.

I.

Where the jury's answers to different interrogatories are inconsistent with each other, such inconsistency will not vitiate the general verdict, since the inconsistent answers merely neutralize each other.

It certainly is not true that every inconsistency between a general verdict and special findings by a jury will render void the general verdict and authorize a final judgment contrary thereto. If a jury in special findings find a material fact in favor of the contention of each party, and then find a general verdict in favor of one, it is manifest that they have found the fact twice in favor of one party and only once in favor of

the other; yet it is contended that the final judgment must be for that party in whose favor the jury find only once. Logically it would seem that the special findings, as a whole, must be inconsistent with the general verdict before they should be permitted to overcome a general verdict. If the same question in varying language may be submitted to a jury half a dozen times, and an apparent inconsistency in any answer be held to avoid the general verdict and entitle the party against whom the general verdict is, to final judgment, then special findings, so far from accomplishing the purpose for which they are designed, become mere instruments for the destruction of justice. The true rule would seem to be, and this rule seems to be reasonably well supported by precedents, that all answers which are not vitally material to the controversy, all answers which tend to establish mere probative facts as distinguished from ultimate facts, and all answers which are inconsistent with each other, should be disregarded, and the general verdict should then be tested by such answers as remain, and, unless in clear and irreconcilable conflict therewith, should be allowed to stand.

Dickey vs. Shirk, 27 N. E. Rep., 733.
Shenners vs. West Side Ry. Co., 47 N. W. Rep., 622.
Foster vs. Garfield, 34 Mich., 355.
Gates vs. Scott, 24 N. E. Rep., 257.
Smith vs. Heller, 21 N. E. Rep., 657.

II.

The general verdict is equivalent to a special finding in favor of the plaintiff as to every material fact in issue.

Argument or authority to support this proposition would seem to be unnecessry. If required, however,

we beg to refer to the case of Flournoy vs. Lastrapes, decided by this Court in 1879, but not reported in the official reports. It will be found in the Lawyers' Co-operative Edition, book 27, page 406.

In conclusion, we beg to submit, that this case, if reversed, should be remanded to the court below, with instructions to render judgment in favor of plaintiff in error on the general verdict—not for a new trial. If we are correct in our contention that there is error in this record, the error lies in the refusal of the court below to render judgment on the general verdict as returned by the jury, and therefore the order should be that judgment should be so rendered.

Respectfully submitted,

JAMES G. FITCH,

NEILL B. FIELD,

Counsel for Plaintiff in Error.

165-593

Court, U. S.
D.
JAN 21 1897
JAMES H. McKINNEY,
CLERK.

165-593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

No. 171.

Margaret E. Walker,
Plaintiff in Error,

vs.

New Mexico & Southern Pacific Railroad Company,
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

E. D. KENNA,
ROBERT DUNLAP,
ATTORNEYS FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1896.

No. 171.

Margaret E. Walker,
Plaintiff in Error,

vs.

New Mexico & Southern Pacific Railroad Company,
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

STATEMENT OF THE CASE.

This action was brought by plaintiff in error against defendant in error in the District Court of Socorro County, Territory of New Mexico, to recover damages in an action of trespass on the case for injuries to real and personal property alleged to have been caused by the said New Mexico and Southern Pacific Railroad Company.

In the original declaration filed in the case it was alleged that on the 1st day May, 1885:

"The waters from rainfalls were accustomed to pass and flow in their natural fall from the surrounding and adjacent country over the plaintiff's and other lands in the

vicinity, as well as over the lands of the defendant, and flow and empty into the Rio Grande river, and the surface water by that means has always been, until the time of the grievances herein set forth, carried off from the premises of the plaintiff and others, without injury or damage to them or their property, yet the said defendant * * * did dam up, cut off and close up all of the natural and usual outlets and places where the surface waters as aforesaid had been accustomed to flow to reach their depositing place, the Rio Grande river * * * that the roadbed of defendant's railroad runs both parallel with and at right angles to said Rio Grande river, in passing through the City of Socorro aforesaid, and runs also between the said river and the premises of said plaintiff, so that *the surface waters, as aforesaid, in passing over the lots and premises* of this plaintiff and others, in order to reach the said river, have to pass over the premises of the said defendant."

The declaration further alleged that the defendant had maintained sluices, water-ways and culverts sufficient for the carrying off of the surface water which accumulated upon the lands adjacent to its railroad track in time of heavy rainfalls, but that before the first day of May, 1885, had, "*closed up, cut off and made dams at all of the openings and places along the line of its roadbed through which the accumlated surface waters from rainfalls were accustomed to make their escape and have their outlet in natural and artificial courses to the said river,*" and that such closing up and damming up of such outlets "has prevented and cut off all the *surface water* from passing beyond its said roadbed, thereby causing all the *surface water* heretofore flowing to the river to be dammed up and set back upon the premises of the plaintiff and other property owners in the vicinity thereof."

That by means of the closing up and cutting off of the outlets and channels by which the surface water aforesaid

was discharged into the river, and retaining the same upon the west line of its roadbed, as the same passes through the City of Socorro, on or about the 7th day of September, 1886, "*by reason of a heavy rainfall which occurred on or about said day*," the surface water from said rainfall accumulated upon the premises of the defendant and were set back upon those of the plaintiff and others, forming a large pond three or four feet deep and undermining a large two-story hotel building and causing the same to fall to the ground and washing out and damaging other buildings and property of the plaintiff.

To this declaration a demurrer was filed by the defendant and sustained upon the ground that at common law no action would lie for the damming up of surface water and flooding of premises of an adjacent property owner by the owner of the lower estate; that at common law there exists no natural servitude in favor of the owner of higher grounds and fields as to mere surface water or such as accumulated by the falling of rain or the melting of snow, and that the proprietor of the lower estate may, if he choose, lawfully obstruct the natural flow of such surface water.

Being now somewhat advised as to the law, an amended declaration was filed by plaintiff, containing a curious jumble, carefully avoiding the use of the word "surface" as applied to water, but complaining in ambiguous terms of damages caused by the alleged damming up of water falling upon lands in the vicinity by obstructing so-called natural and artificial water courses, channels or ditches by embankments built and maintained by the railroad company. It was substantially claimed in the amended declaration that from time immemorial there was a regular water course known as the Rio

Grande, flowing in its accustomed channel in a southerly direction, distant one-half mile east of the premises of plaintiff, and into which river, water from the north and west of plaintiff's premises and from the Socorro and Magdalena mountains in the natural fall from thence and the adjacent and surrounding country pass over and by lands of plaintiff and other land in the vicinity and over the lands of the defendant company in natural and artificial water courses and empty into the Rio Grande, and such waters were carried off from the premises of plaintiff and others in that vicinity by means of natural and artificial water courses to the Rio Grande river; that on the 1st day of May, 1885, and ever since, as well as before, the defendant closed up the natural, artificial and usual outlets, and courses where the water, flowing from the adjacent country and the mountains, had been accustomed to flow to reach the Rio Grande; that the roadbed of the defendant's railroad runs parallel and at right angles with the Rio Grande in passing through the City of Socorro and passes between the Rio Grande and the premises of plaintiff; that this closing up of the openings, sluices, canals, natural and artificial water courses, aforesaid, was by building heavy earth and rock embankments on its roadbed, and in grading the same and raising the grade thereof, and has thereby prevented and cut off the means of escape of water from the country north and west of plaintiff's premises and from the Magdalena and Socorro mountains and hindered the flow of water through, under or beyond the defendant's railroad; that by reason of said grading, filling and embankment, defendant did, on the 9th of September, 1886, stop up, impede, and set back the water flowing from the adjacent country to the north and west of plaintiff's premises in its natural flow and descent to

the Rio Grande, and caused the same to flow back upon the premises of plaintiff, forming a large pond, causing the hotel building to fall down, etc. (Pr. Rec., 9, 10.)

It was not alleged that the artificial water courses were appurtenant to plaintiff's premises or that by reason of any right acquired by prescription or grant plaintiff obtained an easement of drainage of his lands through such artificial water courses over defendant's land. Indeed, the artificial water courses seemed to run from other lands in the vicinity. The only ditch described in the bill of particulars extended to a point at or near the roadbed but not over it.

Plaintiff filed a bill of particulars with the declaration, specifically describing the natural and artificial outlets and courses through which water flowed from the north and west of plaintiff's premises. (Pr. Rec., 14, 15.) None of the alleged natural or artificial water courses, it seems from the bill of particulars, ran over lands of the plaintiff and the water appears to have been dammed up near the point of intersection of two railroad embankments one-half mile south of the depot building but wholly by the south embankment or what the jury found was the Magdalena branch of the New Mexican Railroad Company, made during the year 1883.

A plea of general issue was filed. The jury returned a general verdict finding the defendant guilty and assessing damages at $9,212.50. *Without any objection whatever either from the plaintiff or the jury, the latter also returned, in answer to questions submitted, their special findings of fact, which are a part of their verdict*, and are as follows:

Q. 1. At the time of the injury complained of did any of the water flow or run over the plaintiff's land, except the water which fell from the clouds as rain?

A. It did run.

Q. 2. *Was there a cloudburst in the Magdalena or Socorro mountains on September 8, 1886; and if so, was the water therefrom the water which ran over plaintiff's land?*

A. *Yes.*

Q. 3. *Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, surface water?*

A. *Yes.*

Q. 4. *Was it customary for water to collect and stand on plaintiff's land and land in the immediate vicinity thereof, in the times of heavy rains or floods?*

A. *No.*

Q. 5. *How often upon an average in any one year did the water come down the arroyos leading towards the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8, 1886?*

A. *According to the rain which fell.*

Q. 6. *How far is the mouth of the main arroyo* which runs through the western part of the City of Socorro in a a northerly direction *from the main line of the railroad?*

A. *Three-quarters of a mile, more or less.*

Q. 7. Is there any well-defined water channel east of the Acequia Madre of Socorro towards the main line of the railroad, except the ditch of the New Mexican Town Company and the Acequia between said ditch and the main line of the railroad?

A. There is.

Q. 8. Does the railroad of the defendant cross any arroyo leading from the Magdalena or Socorro mountains at any place north of the Magdalena branch of the New Mexican Railroad Company at its junction with the main line one and one-half miles?

A. Yes.

Q. 9. If you state in answer to the last question that there was such an arroyo, state where it is, its length, breadth and the height of its banks.

A. West of the City of Socorro and east of the Catholic graveyard; its banks are about two feet, its width about sixty feet, and about a mile in length, more or less.

Q. 10. If you find the defendant has damaged plaintiff's land and property, state how, and how much, and give each item with amounts; state fully.

A. Damming up the water by the railroad embankment, on account of not having a sufficient outlet for its natural course.

Q. 11. Do you find any more of a water course on plaintiff's land or in the immediate vicinity thereof than what is to be seen upon any of the bottom or valley lands north of the Magdalena branch one and one-half miles, and west of the railroad tracks?

A. There is.

Q. 12. *If there was any water dammed up, was it water coming from rains or floods?*

A. *Floods.*

Q. 13. *If there was any water dammed up was it not dammed up by the embankment of the Magdalena branch of the New Mexican Railroad Company?*

A. *Yes.*

Q. 14. How far from the main line of the railroad, in a westerly direction, are the *mouths of the arroyos* testified to by the witnesses?

A. *Three-quarters mile to main arroyo, and one-quarter of a mile to lower arroyo.*

Q. 15. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad, is it level or sloping, and for what purposes was it used in 1886?

A. It is level now and in 1886 it was an arroyo, and there is no ditch now excepting the company drain.

Q. 16. *Was the water which came down from the mountains on the day of the damage done to plaintiff caused by a cloudburst or by ordinary rains.*

A. *Cloudbursts.*

Q. 17. Was the flood which destroyed plaintiff's house an ordinary flow of water or was it extraordinary and unprecedented in its character?

A. As at other times.

Q. 18. Was the water overflowing the Rio Grande on the east side of the railroad track as high as it was on the west side of the railroad track at the time plaintiff's property was damaged?

A. That of the river was lower.

Q. 19. *If you answer that there was a cloudburst in the Magdalena and Socorro mountains and the water coming down the arroyos was extraordinary in its character, state whether or not the waters flowing in the main arroyo west of the City of Socorro overflowed and broke through the east bank of said arroyo at the west end of Spring street, in the City of Socorro, and then passed in an easterly direction in great volume down Spring and other streets in said city to the low bottom lands immediately west of defendant's railroad.*

A. *Yes.*

Q. 20. State whether or not the lands west of the railroad track as far as the town company ditch are low bottom lands liable to overflow in time of high water from the Rio Grande?

A. No.

Q. 21. If you state "yes" to the last question, state whether or not the Rio Grande, at the time of the damage to the plaintiff's property was overflowing its banks and level with the cross ties on the embankment of the railroad?

No answer.

Q. 21. If you say yes to the last question state whether or not if there had been no railroad embankment the water overflowing from the Rio Grande would have overflowed the low lands where was situate the plaintiff's property?

A. No.

Q. 22. How far is it from the mouths of the arroyos testified to by the witnesses to the Magdalena and Socorro mountains?

A. To the Socorro mountains four miles and to the Magdalena mountains eighteen miles.

Q. 23. How far is it from plaintiff's property to the Magdalena or Socorro mountains?

A. More or less, the same distance as in the foregoing answer.

Q. 24. How far is it from the railroad embankment to the Magdalena or Socorro mountains?

A. If it is the embankment which runs to Magdalena, it runs south of Socorro mountains and north of the Mag-

dalena mountains a distance of 100 yards, more or less, from the Magdalena mountains and against the Socorro mountains and *if it is the embankment which runs along the Rio Grande valley* from north to south, it is five or six miles from the Socorro mountains and about eighteen or twenty miles, more or less, to the foot of the Magdalena mountains.

Q. 25. *Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water?*

A. *Railroad.*

Q. 26. State when the arroyo running down Spring street, in the southern part of the City of Socorro, was made?

A. We don't know.

Q. 27. If you state that the waters coming down the arroyo through the western portion of the City of Socorro overflowed and broke through the banks of said arroyo at or near the western end of Spring street, state how far it is from the point of overflow at or near the western end of Spring street to the main line of the railroad.

A. Seven hundred yards, more or less.

The questions are found on pages 26 and 27, the answers of the jury on page 21 of the record.

Defendant thereupon moved for judgment upon the special findings of the jury, which was granted, the plaintiff excepting to the ruling and judgment, "on the ground that the special findings of the jury are not inconsistent with the general verdict and are not sufficient to warrant a judgment in favor of defendant, and that the court ought to render judgment for the plaintiff on the general verdict." (Rec., 22.) This judgment, however, was nine days afterwards, on May 27, 1893, set aside and vacated, and with it fell the exceptions of the plaintiff. (Rec., 22.) Thereupon, plaintiff filed motion for new trial, which was overruled, but this ruling need not be noticed as it is not subject to review, not being assigned

as error and no bill of exceptions being preserved. Thereupon, on June 1, 1893, the following entry appears:

"Now comes the plaintiff and files a motion in arrest of judgment in favor of defendant on the special findings and moves the court for judgment on the general verdict in favor of the plaintiff, which said motion is by the court heard and overruled, to which said ruling of the court plaintiff excepts.

"Wherefore, it is considered that the plaintiff take nothing by her writ, and that the defendant go hence without day, and recover of the said plaintiff, as administratrix of Ashael C. Walker, deceased, its costs herein to be taxed."

No exception was taken to this judgment.

Alleged Errors.

The motion purporting to have been made by plaintiff in arrest of judgment in favor of defendant on the special findings is an anomoly. A defendant may move in arrest of judgment upon a verdict against him upon the ground that the declaration is so insufficient as not to state a cause of action. A plaintiff may move for judgment, notwithstanding a verdict against him, if under the pleadings he is entitled to judgment, but plaintiff does not move in arrest of a judgment in favor of a defendant upon a verdict. The motion filed being an anomoly was properly overruled. There is left, therefore, nothing for review, except the action of the court in overruling plaintiff's motion for judgment on the general verdict in favor of plaintiff; but plaintiff would not be entitled to have this motion sustained if the special findings are inconsistent with the general verdict.

Two errors were assigned by plaintiff in error. (Rec., 23.)

First. "That the court erred in entering judgment in favor of the New Mexico and Southern Railroad Company on the verdict of the jury."

Second. "That the court erred in refusing to enter judgment in favor of the plaintiff in error, Margaret E. Walker."

The first error cannot be considered, since no exception was taken to the judgment as finally entered in favor of defendant, though as we shall show it was proper. Whether the court erred, as claimed in the second assignment, will depend upon whether, under the pleadings, the general verdict and the special findings, plaintiff would be entitled to judgment.

It is nowhere suggested in the record, beyond the opinion of the Supreme Court copied therein, that it was at any time insisted that the law of the territory, requiring the court to direct the jury in addition to the general verdict to find upon particular questions of fact to be stated in writing by either party, was or is void or unconstitutional. The only objection ever stated by plaintiff was, as heretofore mentioned, that the special findings were not inconsistent with the general verdict.

It is now claimed that the law of the Territory of New Mexico, "An act in relation to trial by jury," being chapter 45, page 87, Laws of New Mexico, 1889, is unconstitutional, as being in conflict with the Seventh amendment to the Constitution of the United States. The law of the territory is as follows:

"SECTION 1. In all trials by jury in the district courts, the court shall at the request of the parties or either of them or their counsel, in addition to the general verdict, direct the jury to find upon particular questions of fact to be stated in writing by the party or parties requesting the same.

SEC. 2. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

POINTS.

I.

PLAINTIFF, IN FAILING TO OBJECT TO THE SUBMISSION OF QUESTIONS TO THE JURY, BUT TACITLY ACQUIESCING THEREIN, AND PERMITTING THE JURY TO ANSWER THE SAME, AND THE JURY ANSWERING THE SAME WITHOUT OBJECTION ON THEIR PART, IS NOT IN A POSITION TO QUESTION THE VALIDITY OF THE TERRITORIAL LAW IN RELATION TO TRIAL BY JURY, BUT JUDGMENT MUST BE RENDERED IN FAVOR OF THE PARTY WHO, UNDER A CONSTRUCTION OF THE PLEADINGS AND THE GENERAL VERDICT AS QUALIFIED OR RENDERED NUGATORY BY THE SPECIAL FINDINGS, IS ENTITLED TO THE SAME.

II.

THE TERRITORIAL LAW ABOVE REFERRED TO IN NO SENSE DENIES LITIGANTS THE RIGHT OF TRIAL BY JURY AND IS NOT IN CONFLICT WITH THE SPIRIT OR PROVISION OF THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION, IF SUCH AMENDMENT WERE APPLICABLE.

III.

THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION APPLIES ONLY TO CIVIL CASES TRIED IN THE FEDERAL COURTS AND HAS NO APPLICATION TO TRIALS IN TERRITORIAL COURTS. THE AUTHORITY, JURISDICTION AND POWERS OF THESE COURTS AND THE PRACTICE THEREIN ARE LIMITED SOLELY BY CONGRESSIONAL AND TERRITORIAL LEGISLATION PASSED THEREFOR.

IV.

THE SPECIAL FINDINGS ARE INCONSISTENT WITH THE GENERAL VERDICT AND NEGATIVE THE RIGHT OF PLAINTIFF TO RECOVER UPON ANY LEGAL CAUSE OF ACTION STATED IN THE AMENDED DECLARATION.

ARGUMENT AND AUTHORITIES.

I.

THE JURY HAVING RETURNED A GENERAL AND SPECIAL VERDICT WITHOUT OBJECTION, THE GENERAL VERDICT EMBRACING WITHIN ITSELF A CONCLUSION OF LAW MUST BE HELD TO BE NUGATORY IF IN CONFLICT WITH THE SPECIAL FINDINGS, AND JUDGMENT MUST BE RENDERED ON THE SPECIAL FINDINGS OR SPECIAL VERDICT.

Plaintiff having failed to make timely objection to the direction of the court requiring the jury, if they returned a verdict in favor of the plaintiff, to answer questions submitted, and thereby also return in substance a special verdict, cannot now complain of the action of the court or jury. The special findings of fact is as much the verdict of the jury as the general verdict. The court must act upon both. If in the finding of facts the jury find a material fact against the plaintiff, it is manifest that the general verdict is inconsistent with the truth specifically found by the jury and the latter must control. In the general verdict the jury have manifestly come to a conclusion based both upon law and fact. If from the record this conclusion appears to be wrong, it should be held to be void or nugatory. In finding a spe-

cific fact, the jury are only controlled by the evidence in the case.

It is settled that in case a general and special verdict be returned, it is the duty of the court to disregard or hold the general verdict as void if inconsistent with special facts found, and to render judgment upon the special finding. This was true at common law and was so decided in *Richardson* v. *Weare*, 62 N. H., 80. That was an action for damages from a defective highway and was tried on the general issue. By request of defendant's counsel the jury were directed to answer this question: Did the injury to the plaintiff occur in consequence of any neglect or fault on his part? A general verdict was returned for the plaintiff and the special question was answered in the affirmative. The court rendered judgment for the defendant. Plaintiff excepted, but the judgment was affirmed. In the opinion, it is said:

"It was decided in *Walker* v. *Sawyer*, 13 N. H., 191, 196, 197, that, in a case tried on the general issues, the court would not submit a particular question of fact to be found and returned by their verdict, without the consent of the parties. But when it is proposed to submit specific questions to the jury, it will be taken for granted that the parties assent, unless they object at the time, and before the jury retires. *Willard* v. *Stevens*, 24 N. H., 271, 277; *Allen* v. *Aldrich*, 29 N. H., 63. And later, in *Barstow* v. *Sprague*, 40 N. H., 27, 33, it has been decided that the court, against the objection of either or both parties, may properly direct a jury to return, with a general verdict, answers to specific questions submitted to them. No objection having been taken at the time, to the submission of the special question to the jury in this case, the plaintiff must be understood to have consented, and the objection after verdict comes too late.

The special finding of fact was conclusive * * * and being a material fact upon which the general verdict depends, it must control the general verdict."

This is in consonance with the old authorities. In Bacon's Abridgement, Vol. 10, pp. 313 and 314, VERDICT (E), it is said that if a jury, after finding a fact specially, take upon themselves to draw a conclusion not warranted by law, the court ought not, in giving judgment, pay any attention to the conclusion of the jury.

In Tomlin's Law Dictionary, Vol. 2, page 306, it is said:

"Where the jury find the fact but conclude upon it contrary to law, the court may reject the conclusion."

Again, on page 312 of the same volume, it is said:

"If the jury find the facts specially and add their conclusion as to the law, it is not binding on the judges, but they have the right to control the verdict and declare the law to be as they conceive it to be."

See,

2 Hawkins' Pleas of the Crown, 8th Ed., Ch. 47, Sec. 4.

2 Hale's Pleas of the Crown, 302.

Applying this old and well-recognized principle, it is manifest that if the general verdict, being a conclusion of the jury upon the law, as based upon the facts specifically found by them, be not justified by or rather be inconsistent with the specific facts, the court must disregard the general verdict as being wrong and nugatory and render judgment upon the facts found specially. We shall show hereafter that the general verdict is inconsistent with the material facts found specially.

II.

THE TERRITORIAL LAW DOES NOT DENY THE RIGHT OF TRIAL BY JURY IN SUITS AT COMMON LAW.

The Seventh amendment to the Federal Constitution reads:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury shall be otherwise re-examined in *any court of the United States* than according to the rules of the common law."

What is the *right* of trial by jury which is to be preserved? It is not the mode, method or practice at common law by which issues are framed whereby some question or questions of fact are to be found or determined by the jury. Common law forms of action and the verdicts, general or specific, applicable to the issues formed thereunder, have been abolished in most of the states. The common law verdicts are unknown under codes of civil procedure. Instead of the general issue in an action on the case at common law, under which there is put in issue facts involving all sorts of defenses, now, under the code practice in many of the states, the defendant is required to set up specific defenses or facts constituting the same, so that issue may, as in some forms of common law actions, be narrowed down to a single fact or a few isolated facts. It is also within the legislative power, in prescribing modes of procedure by which questions of fact may be submitted to the jury, to provide that after the evidence produced upon the trial is in, the issue of fact made by the evidence may be presented to the jury in the form of special questions by either party to ascertain the determination or conclusion of the jury upon the

truth of the fact or facts put in question under the evidence or under the pleadings. It is simply another method of framing issues of fact which are to be determined by the jury.

Laws have been passed in a number of states containing provisions similar to that of the territorial law under discussion.

See the list in the note, pp. 399 to 403, inclusive, in Vol. 28, Am. & Eng. Enc. of Law.

These states, as a rule, contain appropriate provisions in their constitutions guaranteeing the right of trial by jury. In Ohio and Kansas the constitutional provision is: "The right of trial by jury shall be inviolative." Yet it has not been held in any of those states, so far as we are aware, that such statutory provision in regard to special findings violates the right of trial by jury in any respect. While there is, of course, a technical distinction between findings of fact accompanying a general verdict and the special verdict as generally known in the common law practice, yet there is great analogy between the two. The special verdict as a rule was not accompanied by a general verdict, the jury usually leaving the conclusion as to what party should recover to the court, or they would put their general verdict or conclusion in the alternative. Yet no particular form or technical ending was necessary.

In the additional note, page 623 of Pollock & Maitland's History of English Law, Vol. 1, we find an early instance of a special verdict and how the same was arrived at in a case tried in 1292 (20 Ed., 1), a similar practice being indulged in to a very late day of having the jury answer questions propounded by the court. That was

the case of Thomas de Evesham, parson of Carlton, against Richard de Furneys and six others. It was an action of trespass, counting upon defendants mowing plaintiff's rye in a field called Parsones Breck, and depasturing his oats by their cattle. After special pleas, setting up among other things that the *locus in quo* was their common pasture, plaintiff replies it is the soil and dower of his church, and, being sown, the defendants wrongfully pastured it. Issue to the country. The jury find certain facts involving the rights of the parties in detail, then finding the value of the crop at 25s. 6d. Being asked about the damage Thomas suffered by reason of the destruction of the grain over and above its value, they say he is damaged to the amount of 60s. The court finds from the facts the plaintiff is entitled to recover, and orders judgment on the findings for the destruction of the grain, taxed by the jurors at 25s. 6d., and for damages, which are reduced by the justices to 20s.

When the jurors gave a special verdict they were frequently required by the court to answer a long list of questions, and the answers were recorded.

Pollock & Maitland's History of English Law, Vol. 2, pp. 628 and 629.

The jury was always at liberty to find the facts or what was called a special verdict, and thus avoid the danger of an attaint which might follow from an erroneous general verdict in giving which they might have misapprehended the law. It seems, however, that the judges were sometimes averse to taking upon themselves the responsibility of the decision, and rejected special verdicts, attempting to compel the jurors to give statements explicitly answering the words of the writ, thereby in effect requiring an

oath about a matter of law. To obviate this, the Statute of Westminster, II, C. 30, was passed in 1285, forbidding judges to do this, by providing that "the justices of assise shall not compel the jurors to say precisely whether it be a disseizin or not, so as they state the truth of the fact and pray the aid of the justices; but if they will say of their own accord that it is a disseizin, their verdict shall be admitted at their own peril."

Pollock & Maitland's History of the English Law, Vol. 2, p. 628.

Dowman's Case, 9 Coke's Reports, 12 *b.* and 13 *a.*

In the latter case it is said:

"In actions real, personal and mixt, and upon all issues joined, either between the King and the party, or between party and party, the jury may find the special matter, which is pertinent, and tends only to the issue joined, upon which, being doubtful to them in law, they may pray the opinion of the court; and this they may do by the common law, which has ordained that matters in fact shall be tried by jurors, and matters in law by the judges; and as *ad quaestionem facti non respondent judices, ita ad quaestionem juris non respondent jurat*, but their duty is to find *veritatem facti*, and to refer the discussion of the law to the justices, and therefore their finding is called *veredict', quasi dict' veritatis* the saying of the truth, and the determination of the judges is called *judicium quasi jurisdictum, i. e. ipsa viva vox juris*, the saying of the law, and the wisdom of the law was to refer things to persons in which they had knowledge and were expert," etc.

See, also, notes to page 627, Vol. 2, Pollock & Maitland's History of the English Law, for instances of verdicts with reasons.

So if counsel for one of the parties refuse to sign the minutes for a special verdict, the judge may direct the

jury to find one from the minutes as signed by one of the counsel for the other party.

Bacon's Abridgment, Vol. 10, p. 111, VERDICT (D).

So the judges may amend the special verdict, in civil cases as to matter of fact, which, from his notes, under the evidence, is not disputed, and give judgment accordingly.

Bacon's Abridgment, Vol. 10, pp. 311 and 312, VERDICT (D).

Sleight v. *Hartshorn*, 1 Johns., 149.

It is sometimes said that at common law the jury cannot be compelled to find other than a general verdict, and may decline to answer questions put to them by the judge.

See *Mayor and Burgesses of Assises* v. *Clark*, 3 Ad. & Ell., 506; though in that case it was only claimed in a motion for a new trial that the verdict should not stand because the foreman of the jury had refused to answer questions put to him by the judge concerning a fact which might have been involved.

The reason for the ruling in that case will be apparent. The practice by which issues were framed and under which verdicts were rendered could not be altered by the trial judge. The jurors were sworn upon their oaths to return a true verdict under the issues joined, that is, by the pleadings. This was all their oath required them to do, and as the practice then stood the judge could not compel them to do more, nor did he try to in that case; but, while the judge could not change the practice under which the issues were joined and the questions of fact presented for the determination of the jury, yet the legis-

lature might so regulate the practice as to prescribe a different mode and manner of presenting to and having determined by the jury questions of specific facts which might arise under the evidence or pleadings. In Massachusetts and some of the New England states, practice contrary to that of the English case above referred to has long been in force.

See,

Spurr v. *Shelburne*, 131 Mass., 429, 430.

In 2 Hawkins' Pleas of the Crown, 8th Ed., Ch. 47, Sec. 4, it is said that the jury shall not find the defendant guilty generally of homicide *se defendendo* or *per infortunium*, but must set out the whole circumstances of the fact and in the conclusion show of what crime they may find the defendant guilty, wherein if they be mistaken it is said that the court may notwithstanding give such judgment as shall appear to be proper from the facts specifically set forth.

See,

2 Hale's Pleas of the Crown, 302.

Thus in criminal practice we have an instance of a special and general verdict combined.

So we find from the earliest times of jury trials that the only function and province of the jury was to ascertain the facts, and litigants had no right to demand more at their hands.

In Pollock & Maitland's History of English Law, Vol. 2, p. 628, it is said:

"The principle that jurors are to speak only about matters of fact and are not concerned about matters of law is present from the first."

See,

Dowman's Case, supra.

Therefore, if, under the practice prescribed by the legislature, questions of fact in actions at common law are submitted to the determination of the jury, the parties have had a jury trial. The constitutional amendment was not adopted to keep in force the peculiar rules of pleading and practice under common law forms of action. It would be a matter of difficulty to determine what these would be for the practice followed in the different states of the Union at the time of the adoption of the constitution varied considerably.

See the Federalist, Art. No. 83, by Mr. Hamilton.

All that was intended to be preserved to the litigant was the substantial *right* of trial by jury, that is, the right of having determined by the unanimous decision of twelve impartial men selected from the vicinage or body of the county disputed questions of fact.

Mr. Justice MILLER, in his Lectures on the Constitution of the United States, at page 511, quotes approvingly the definition of trial by jury found in the Encyclopædia Brittanica, and on page 512 he says, speaking of the jury system:

"The distinctive characteristic of the system is this: that the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts, who are quite distinct from the judges or court. They are to decide upon the effect of the evidence, and thus assist the court to pronounce a right judgment: but they have nothing to do with the sentence or judgment which follows the verdict."

* It is the province and the function of the court to give, and, where the facts are undisputed, apply the law. Thus the Federal courts have at all times withdrawn cases from the jury where there was no dispute as to the facts under or established by the evidence, and have di-

* Territorial law of Utah providing for concurrence of nine jurors only in verdict upheld.
Hess v. White, 53 Pac., 243.
Pratt v. Parsons, 43 Pac., 620.

rected verdicts in favor of the plaintiff or the defendant, as the facts disclosed by the undisputed evidence justified (*Southern Pac. Co.* v. *Pool*, 160 U. S., 440); yet in doing so it has never been considered that they were denying the rights of litigants to a trial by jury. So in prescribing the practice or procedure for the trial of cases, the legislature may well enact that the jury, while returning a general verdict under the issues made by the pleadings, which verdict must necessarily embrace conclusions of law and fact, shall also find the specific facts put in issue, or disputed by the evidence introduced at the trial, so that such facts shall appear upon the record as the true facts in the case. In doing so the province of the jury has not been invaded. Certainly the right of the litigant to a jury trial has not been taken away or destroyed.

The statute of the territory is a wholesome regulation in the furtherance of justice, tending to avoid unnecessary trials. Jurors more readily apprehend evidence than the law. They are less apt to be mistaken in determining facts proven by the evidence than in coming to a general verdict which involves a complicated application of the law to all the facts, which they may not readily or easily make. By the jury finding specific facts in addition to the general verdict, the court is able to apply the law and render judgment for the party who under the facts specifically found is justly entitled to the same. The result is in no respect different than if the pleadings or the stipulation of the parties had admitted the truth of the facts which the jury are supposed to truthfully find and state in answer to questions submitted to them.

In *Morrow* v. *Commissioners*, 21 Kans., 484–503, Judge BREWER, writing the opinion, well says:

"The main object of special questions is to bring out

the various facts separately, in order to enable the court to apply the law correctly and to guard against any misapplication of the law by the jury. It is a matter of common knowledge that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, where at the same time it will find a certain fact to have been proved which in law is an insuperable barrier to a recovery in accord with the general verdict. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists, without some sufficient evidence that it exists."

So in *Buntin* v. *Rose*, 16 Ind., 209, 210, it is said:

"Before the enactment of our statute enabling a party to ask that a jury shall respond to interrogatories, it was difficult to have placed upon the record of a trial the component parts of, or elements which entered into and proved, the verdict of a jury. This was felt and considered as operating injuriously in many instances, because of the current of decisions in this court for many years, to the effect that a verdict in a civil case should not be disturbed on the evidence, where there was proof tending to sustain it."

It is held under similar statutes that only material questions should be submitted to the jury.

Neither does the latter part of the seventh amendment apply. In the first place, it is a limitation upon the Federal courts alone. "No fact tried by a jury shall be otherwise re-examined *in any court of the United States* than according to the rules of the common law." Territorial courts are not courts of the United States.

See,

McAllister v. *United States*, 141 U. S., 183.

However, the provision above quoted was adopted to prevent a misconception of the provision in the second paragraph of section 2, article 3, of the Federal Consti-

tution, providing, "In all other cases before mentioned the Supreme Court shall have appellate jurisdiction *both as to law and fact*," etc. While it was contended in the Federalist that this provision concerning appellate jurisdiction both as to law and fact might well be limited to equity and admiralty cases, it was contended by the opponents to the constitution that this gave the Supreme Court the power to examine into facts found by a jury and set aside these facts and find others under the evidence, the same as might be done in equity.

Story on the Constitution, 5th Ed., Sec. 1763 to 1768.

The territorial statute does not provide for a re-examination of facts tried or found by the jury or give authority to the court to ascertain whether under the evidence the facts should be otherwise and so find them. The facts are not re-examined in entering judgment on a special finding, but the court enters judgment upon the verdict of the jury and disregards the mere conclusion which, by the special finding, is shown to be wrong. This was the practice at common law under a special case, as well as under a special verdict, with a wrong conclusion.

III.

THE SEVENTH AMENDMENT HAS NO APPLICATION TO TERRITORIAL COURTS.

Serious objection was made in the states to the adoption of the constitution, because in cases at common law, parties if sued in the Federal courts, it was said, could not demand as of right a trial by jury, and it was even

contended that Congress did not have power to make a provision of that sort. The objection was aimed at the exercise, of course, of the judicial power given by the constitution to the courts of the United States, and we find, therefore, in the Seventh amendment the specific designation of "any court of the United States." The whole amendment can only be interpreted as having application to the trial of suits at common law in the courts of the United States in which would be invested the judicial power conferred by the constitution upon the general government. They had no thought of making any provision in favor of, nor were the states much concerned about, the inhabitants of the territory. That matter had already been regulated by the ordinance of the Congress of the Confederation of 1787. Under that ordinance, Congress under its general surpervising power over this property, had created a government for the territory north-west of the Ohio river, and made provision respecting the courts and the trial of cases therein. The ordinance was made applicable by the first Congress in 1789 to the changed condition brought about by the adoption of the constitution, and the Seventh amendment was one of the amendments submitted to the states by the same Congress.

Early legislation respecting the territories carries out this idea by making specific provisions for jury trials, which would be wholly unnecessary if it were understood that the Seventh amendment applied. In the act of March 26, 1804, creating the Territory of Orleans and the District of Louisiana (2 U. S. Stat. at Large, 283), it is provided in section 5 that the judicial power shall be vested in a superior court and such inferior courts and justices of the peace as the legislature of the territory may establish, and that in all cases, criminal and civil, in the

Superior Court, the trial shall be by a jury, if either of the parties require it. Section 8 creates a District Court, but makes no provision for trial by jury therein. With reference to the District of Louisiana, section 12 provides that in all civil cases *of the value of one hundred dollars*, the trial shall be by jury, if either of the parties require it. This would necessarily exclude the right where the amount exceeded $20, but was less than $100. That early legislature did not consider the amendment applicable.

The power of Congress in respect to the territories of the United States is conclusive and universal.

2 Story on the Constitution, Sec. 1328, 4th Ed.

In respect to the territories, the United States is sovereign in all respects, and we are to look to the acts of Congress alone to determine the legislative powers of the territory. An exception to this rule, however, may be found in the third paragraph of section 2, article 3, of the Constitution, to the effect: "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed, but, *when not committed within any state*, the trial shall be at such place or places as the Congress may have by law directed." Here it will be seen that there was in contemplation crimes committed otherwhere than within the states, and, therefore, this provision was intended to cover the case of all trials of all crimes, no matter where committed, if within the jurisdiction of the United States. The Sixth amendment was for the purpose of more fully carrying out the above provision. There is no such idea, however, suggested in

any provision with reference to the trial of civil actions. There could not exist the same solicitude. With respect to the territories, it was naturally supposed that Congress would afford ample protection to suitors therein.

Territorial courts are in no sense courts of the United States, nor do they exercise the judicial power conferred by the constitution upon such courts. On the contrary, they entertain controversies of which the Federal courts could not take cognizance. A large part of the litigation is between inhabitants of the territory in no manner arising out of or depending upon the Constitution or laws of the United States, or involving a subject-matter of which Federal courts could take cognizance. To hold that the amendment applied to trials in courts other than those of the United States invested with the judicial power conferred by the constitution, would be to say that it applied to trials in state courts, for they are no more excluded by the language than territorial courts. It has no application to trials in the state courts.

Edward v. *Elliott*, 21 Wall., 532.
Pearson v. *Yewdall*, 95 U. S., 296.

The power under which territorial courts are established by Congress or the territorial legislature is clearly and ably set forth by ChiefJustic MARSHALL in *American Insurance Company* v. *Canter*, 1 Peters, 542 and 546. In that case the territorial legislature of Florida had erected a court and conferred jurisdiction upon it to determine cases of salvage. A judgment of that court was collaterally challenged. In speaking of the territorial courts, he says:

"The judges of the Superior Courts of Florida hold their offices for four years. These courts are not consti-

tutional courts in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. *They are legislative courts created in virtue of the general right of sovereignty which exists in the government* or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of the judicial power which is defined in the third article of the constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of a general and of a state government."

In *Benner* v. *Porter*, 9 How., on page 242, Mr. Justice NELSON says:

"The distinction between the Federal and state jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts: Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both Federal and state authorities. *There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provision in respect to state and Federal jurisdiction.*

They are not organized under the constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control."

On page 244 he continues:

"Congress must not only ordain and establish inferior

courts within a state, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The territorial courts, therefore, were not courts in which the judicial power conferred by the constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. 1 Peters, 546. Neither were they organized by Congress under the constitution, as they were invested with powers and jurisdiction which that body was incapable of conferring upon a court within the limits of a state."

See, also, similar language in *Cross* v. *Harrison*, 16 How., 194.

In *Clinton* v. *Englebrecht*, 13 Wall., 434, Chief Justice Chase ably reviews the question and legislation in respect to the territories up to that time. In that case it was held that jurors summoned into the territorial courts under acts of Congress applicable only to the courts of the United States are wrongfully summoned, and a judgment on their verdict cannot, if properly objected to, be sustained.

So in *Horabuckle* v. *Toombs*, 18 Wall., 648, it was held that the practice, pleadings, forms and modes of proceeding of territorial courts, as well as their respective jurisdiction, were intended by Congress to be left to the legislative action of the territorial assembly. The objection made in that case was to the intermingling of legal and equitable remedies in one form of action under the procedure adopted by the territory.

McAllister v. *United States*, 141 U. S., 182, *et seq.*

The limit of power of the territorial legislature, with reference to civil jurisdiction, is to be found only in the acts of Congress.

Thus in *Webster* v. *Reed*, 11 How. 437, it was held that a law of the Territory of Iowa which prohibited trial by jury was void, because, as appears from page 460 of the report, the organic law of the Territory of Iowa, by express provision and by reference extended the laws of the United States, including the ordinance of 1787, over the territory so far as applicable. The ordinance of 1787, by reference thereto, will be found to contain a specific provision for trial by jury; so the court held the territorial act void, because in contravention of the act of Congress. Had it been of opinion that the territorial act was in conflict with the constitution, it would, no doubt, have pronounced the act unconstitutional.

The Act of Congress, establishing the Territory of New Mexico, approved September 30, 1850, be section 5, vested the legislative power and authority of the territory in the governor and the legislative assembly. By Section 7, it was provided that the legislative power of the territory should extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act, and that all the laws passed by the legislative assembly should be submitted to the Congress of the United States, and if disapproved should be null and void. In order that a territorial law be declared void under the above provision it must be found to be inconsistent with the Constitution of the United States or the organic act. The law with reference to civil trials in territorial courts cannot be held to be inconsistent with the Seventh Amendment, as that amendment is only applicable to courts of the United States. There is given to the territory the particular power to enact laws upon all rightful subjects of legislation. Procedure in courts and regulation of trials is the rightful subject of legislation.

The territorial law is not inconsistent with the constitution or any law of Congress applicable to territorial courts.

Hornbuckle v. *Toombs*, *supra*.
Clinton v. *Engelbrecht*, *supra*.

IV.

SPECIAL FINDINGS INCONSISTENT WITH GENERAL VERDICT AND NEGATIVE RIGHT OF PLAINTIFF TO RECOVER.

In arriving at a general verdict for plaintiff it will, of course, be presumed that the jury found to be proven under the evidence every fact averred in the declaration and necessary for the plaintiff to establish under the issues. The general issue put in issue only the facts set out in the declaration sufficiently averred to state a legal cause of action. If the declaration be so defective as not to state sufficient facts to constitute a cause of action, the verdict, of course, finds no more than is well pleaded, and does not aid the plaintiff. The general verdict, therefore, finds to exist only such facts as are sufficiently stated in the declaration as the basis of a legal cause of action. The presumption, however, of the general verdict is overcome and overthrown whenever it appears that the jury have found any material fact against the plaintiff which it was necessary for the plaintiff to prove in order to establish a legal cause of action. A special finding of fact by the jury does not contain a conclusion or involve an application of principles of law which the jury may not understand. The special finding is, therefore, entitled to more weight than the general verdict. It is more apt to be true. Of course, an attempt should be made to harmonize, if it can be reasonably done, the general verdict

and the special findings so that if the special findings be found defective to such an extent as not to negative some material fact which it was necessary for the plaintiff to prove, the general verdict should stand; but if the special findings cannot on an intelligent examination of the same be harmonized with the general verdict, the general verdict cannot be sustained when on the whole finding it is reasonably certain that it ought not to be.

Dupont v. *Starring*, 42 Mich., 492.
Morse v. *Morse*, 25 Ind., 156, 161.

So in the case of *Morrow* v. *County Commissioners*, 21 Kan., 484, it was held that where to a question the jury respond, "We do not know," or in any like manner, such an answer is tantamount to a simple denial, for if, from the testimony, the jury do not know whether an alleged fact exists it follows that the testimony does not show that it exists, and therefore, for the purposes of the case, it does not exist, and such an answer operates against the party whose case needs the support of the alleged fact.

In *Horbaugh* v. *Cicott*, 33 Mich., 246, the rule as to inconsistency between the general verdict and the findings is stated by MARSTON, J., as follows:

"If the jury finds a verdict in favor of the party holding the affirmative, and in answer to certain questions submitted to them, answer in the negative, or say they are unable to find a fact that the party holding the affirmative must establish in order to entitle him to a verdict, then the answers are inconsistent with their general verdict and would control it, or if they should find a verdict in favor of the party not holding the affirmative of the issue, and yet, in answer to the questions submitted to them, should find that the party holding the affirmative had established the issue, here again the special finding would be inconsistent with their general verdict and would control it."

With reference to the special findings themselves, it is apparent that before they can be disregarded, if there should be a conflict, it is necessary that the conflict should be between material findings of fact and should be irreconcilable. If there should be only an apparent conflict between some of the findings, it must be ascertained whether these findings are as to material facts, and then whether they may not be so construed as to be reasonably reconciled. This must be so, because the jury, in finding the facts, have simply been called upon to pass upon the evidence in the case, and to ascertain the true facts as shown by such evidence. This it would be necessary for them to do in order to arrive at any verdict. Of course, if the special findings are inconsistent and irreconcilable among themselves as to a necessary, material fact, neither party would be entitled to a judgment, because the jury must first find the necessary, material facts in order to apply the law and thus arrive at a general verdict. So an irreconcilable conflict between the findings as to a material fact destroys the basis or foundation of the general verdict. In such case there would be no error in refusing to render judgment for either party. The special findings, however, in this case are not inconsistent but may be harmonized with each other.

This court is asked to review the action of two local courts. The trial court, sitting in the vicinity where the alleged damage was suffered, would be familiar with the condition of things and with some terms which might need explanation in this court. The local court was familiar with the term "cloudbursts" and with the peculiar conditions generally of that locality. It was familiar with the term "arroyos" and what was generally understood thereby in that community. Before the rul-

ing of the lower court, affirmed by the local Supreme Court, should be set aside by this court, it should clearly appear that the ruling was erroneous. This court should give the same construction to the findings and verdict of the jury that the two other courts have done, unless such construction be clearly erroneous.

In the case of *Nichols* v. *Weaver*, 7 Kans., 237, the Supreme Court of Kansas, with reference to presumptions in favor of the ruling of the court below upon special findings of fact, said:

"If the evidence had shown that the plaintiff has a cause of action at all, the court below would undoubtedly, under the circumstances, have granted her a new trial, or, if the court had refused to do so, under such circumstances and in such a case the plaintiff would undoubtedly have brought all the evidence to this court, and thereby have shown that the court below had abused its discretion by not granting a new trial under such circumstances. With all the evidence, this court could act more intelligently than it can without the evidence. But even then our means of interpreting the language of the jury would not be as good as the means possessed by the court below."

See, also,

Supreme Lodge K. of P. v. *Hill*, 76 Fed. Rep., 471, 472. (C. C. A., 4th Circuit.)

The only right plaintiff claimed in the declaration to have been violated by the defendant is the supposed natural right of having the water which fell upon the premises of plaintiff or other lands in the vicinity, flow down over such lands in the usual and natural courses for the same, and that the wrong of the defendant consisted in causing this water to be obstructed and thrown back upon plaintiff's premises by reason of an embankment built

and maintained over such supposed natural courses. *Negligence was not alleged or made the basis of the action.* Though the declaration may be vague as to the kind of water which was accustomed to flow over said premises and other lands in such natural courses, yet it can only be sustained by showing that these courses were natural water courses within the meaning of the law, and that it was something more than mere surface water which was dammed up.

The special findings show that the water dammed up was purely surface water from a cloudburst or heavy torrent of rain in the Magdalena or Socorro mountains on September 8, 1886. (See Findings 2 and 3.) This water was carried down through depressions and what are known in that part of the country as arroyos or dry beds, gullies, ruts, or such places in the surface of the earth as show that water at one time has flowed over the same. In the fourth finding the jury find that water was not accustomed to collect or stand on plaintiff's land or in the vicinity thereof in times of heavy rains, although the embankments had been there for several years. From the fifth finding it appeared that water came down the so-called arroyos, leading towards the Rio Grande valley, only as the rain would fall in that vicinity. The only so-called arroyo described by the jury in answer to the ninth question was sixty feet in width, with banks about two feet high and a mile in length, showing the shallowness of the same.

The mouths of the arroyos testified by the witnesses are found, one, the main arroyo, to be three-quarters of a mile from the main line of railroad, and the other, or lower one, one-quarter of a mile distant therefrom. From the twelfth and sixteenth findings, the water which did the

damage, it appears, was caused by a cloudburst in the mountains.

From the other findings, it is clear that the railroad embankment running north and south along the Rio Grand river was constructed in the Rio Grand valley. The railroad embankment intersecting therewith running south of Socorro and west from the river to the Magdalena mountains was what was known as the Magdalena branch of the New Mexican Railroad Company. From all the findings, it is clear that the so-called arroyos before reaching the railroad embankments spread out indefinitely and broadly over the low lands in swags and hollows without definite channels or banks.

It was absoutely essential for the plaintiff to establish as alleged in the declaration, that the embankment which obstructed the so-called water courses and caused the water to flow back was that belonging to the defendant. In answer to the thirteenth question, however, the jury specifically found that the water was dammed up by the embankment of the Magdalena branch of the New Mexican Railroad Company. This is a material finding against the plaintiff and inconsistent with the maintenance of the general verdict.

But the jury find that the water dammed up was simply surface water coming down in a flood from the Magdalena or Socorro mountains, distant from four to eighteen miles. It was the result of a cloudburst—something akin in force and character to what is known as a waterspout in the east. By such cloudbursts, which occur occasionally in that territory, a vast quantity of water falls within a remarkably short period upon a very limited area, and is caused to flow over the adjoining lands in torrents, ploughing its way through the dry soil

and seeking such an outlet through dry gullies or depressions as the surface affords, frequently ploughing new ruts through the dry and sandy soil. As the force of the torrent becomes spent, the waters spread out as the lands become more level. So an arroyo may be made by a single flood or "cloudburst," and by no means is the same rut always followed, but, as shown in this case, a new channel may be cut by an overflow.

The declaration alleges no legal cause of action for the obstruction of an artificial water course, because it alleges no easement by prescription or grant in favor of plaintiff's lands over the lands of the defendant. But the right to have the water flow in such artificial watercourses is placed in the declaration upon the same ground as the right to have it flow through the natural courses. This, of course, cannot be sustained.

The common law, as modified by constitutional and statutory law and judicial decisions, is in force in the Territory of New Mexico.

Browning v. *Browning*, 9 Pac. Rep., 677, 682, 684;
Laws of New Mexico, 1876, Ch. 2, Sec. 2.

Right to Obstruct Flow of Surface Water.

Under the common law, no right of the plaintiff has been violated, as shown by the special findings. At common law, the owner of higher lands has no right to have surface water flow over lower lands in such manner as the nature or situation of the lands may permit. At common law, the owner of any piece of land may improve it or place upon it such structures or embankments as he may

see fit, and is no more obliged to receive merely surface water from higher lands than he would have a right to demand that such water should flow unobstructed from the higher lands to his premises. Every landowner has the right to defend against surface water or use the same as he may see fit.

Hoyt v. *City of Hudson*, 27 Wis., 656.
Gannon v. *Hargadon*, 10 Allen, 106.
Kansas City & Emporia R. R. Co. v. *Riley*, 33 Kans., 366.
Abbot v. *Railroad Co.*, 20 A. & E. R. R. Cases; note and cases cited on page 115.
O'Connor v. *Fond du Lac, &c., Ry. Co.*, 52 Wis., 526.
Johnson v. *C., St. P. M. & O. R. R. Co.*, 80 Wis., 646.
Cuss v. *Dicks*, 44 Pac. Rep., 113.

The findings not only show that the mouths of these so-called arroyos were distant from the railroad embankments, so that the waters which may have passed through such shallow arroyos would be spread out indefinitely over the level or low lands, but the findings also show that these so-called shallow arroyos are in no sense what are known as water courses at common law. Water did not *usually* run in them. It was only on occasions of rare rains or waterspouts that water found its way in or through them. Instead of water usually flowing in them it was rather unusnal. While it is not necessary to constitute a water course that water should always be found there, yet, under the authorities and in reason it is necessary that it should be *usually a stream of running water*. In other words, the cases recognize the fact that a natural stream may dry up in times of drouth, and, of course, by

this accidental circumstance it would not lose its characteristic of being a natural water course; but, on the other hand, when water only runs occasionally therein and is dependent upon the accidental circumstance of freshets or melting snows, it loses the essential characteristic of a natural water course, as its supply is that of mere surface water. The reason for the distinction is, no doubt, due to the fact that in case where there is a stream of water, usually flowing and the supply is not dependent merely upon surface water, the proprietors of the upper and lower tenements have reciprocal rights in the stream with reference to the flow thereof, which neither can interfere with to the prejudice of the other. In the case of mere surface water, however, the upper proprietor may detain it and use it wholly upon his own land and not be subject to an action by the lower proprietor. In this latter case, the right is not reciprocal or mutual. In the former case, it is recognized as a natural right arising *ex jure naturæ*, to have the water flow as it has always been accustomed to flowing, *aqua currit et debet currere ut currere solebat*, or water flowing in a stream, it is settled, is *publici juris* (Tindal, C. J., in *Liggings* v. *Inge*, 7 Bing., 682); in other words, it is the right to have the stream remain as nature has made it. In such case, the proprietor of the upper tenement cannot use the stream upon his own lands so as to impair its use by the owner of the lower tenement. In the case of surface water there is no such right arising *ex jure naturæ* because the flow or supply of surface water is rather an accidental or only an occasional circumstance.

WHAT ARE NATURAL WATER COURSES.

In *Morrison* v. *Buckshort*, 67 Maine, 356, it was said:

"To constitute a water course it must appear that the water *usually* flows in a particular direction, and by a regular channel, having a bed with banks and sides, and so discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it *must have a well-defined and substantial existence.* * * * There is a broad distinction between a stream or a brook constituting a water courses, and occasional and temporary outbursts of water occasioned by unusual rains, or the melting of snows, flowing over the entire place, or the tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and *ravines* which are in ordinary seasons destitute of water, and dry."

In the case of *Barkley* v. *Wilcox*, 86 N. Y., 143, ANDREWS, J., says:

"A natural water course is a natural stream flowing in a definite bed or channel, with banks and sides, *having permanent sources of supply.* It is not essential to constitute a water course that the flow should be uniform and uninterrupted. The other elements existing, a stream does not lose the character of a natural water course because in times of drouth the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water."

In speaking of the stoppage of the flow of surface water in that case, he says, on page 144:

"*The discharge was not constant or usual, but occasional only.* There was no channel or stream in the usual sense of those terms. In an undulating country there must always be valleys and depressions in which water from rains or snow will find its way from the hillsides, and be discharged into some natural outlet, but this does not constitute such valleys or depressions water courses."

This is approved in *Jeffers* v. *Jeffers*, 107 N. Y., 65.

The same view is taken by Mr. Washburn in his work on Easements and Servitudes, 3rd Ed., pp. 278, 279 and 280.

See, also,

Hoyt v. *City of Hudson*, 27 Wis., 661.
Shields v. *Arndt*, 3 Green's Ch., 247.
Dickinson v. *City of Worcester*, 7 Allen, 19, 22.
Fryer v. *Warne*, 29 Wis., 516.
Angell on Watercourses, 5th Ed., Sec. 1, and 7th Ed., Sec. 4.
Gannon v. *Hargadon*, 10 Allen, 106, 109, 110.
City of Bangor v. *Tansil*, 51 Maine, 525.
Turner v. *Inhabitants of Dartmouth*, 12 Allen, 291.
Swett v. *Cutts*, reported in American Law Register (N. S.), Vol. II, p. 11.
Ashley v. *Wolcott et al.*, 11 Cush., 195.
Stanchfield v. *Newton*, 142 Mass., 116.

In the often cited and well considered case of *Bowlsby* v. *Speer*, 31 N. J. Law, 352, BEASLEY, C. J., says:

"It is not one of the legal rights pertaining to land that water falling upon it from clouds shall be discharged over land contiguous to it, and this is the law no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of things the surface water would escape in any given direction. The consequence is, therefore, that there is no such thing known to the law as a right to any particular flow of surface water *jure naturæ*. The owner of the land may at his pleasure withhold the water falling on his property from passing in its natural course onto that of his neighbor, and in the same manner may

prevent the water falling on the land of the latter from coming on his own. In a word, neither the right to discharge nor receive the surface water can have any legal existence except from a grant, express or implied. * * * The water diverted by the building of the defendant was altogether surface water, and he, therefore, had a legal right to obstruct and turn aside its course. If the plaintiff has suffered from such act, it is *damnum absque injuria*. * * * *Nor does it seem to me that there is any significance in the fact that there was an appreciable channel for this surface water from the land of the defendant, and into which it naturally ran. On every hillside numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of water courses.* I am not willing to adopt a doctrine which would be accompanied with so much mischief.''

Whatever was said by the chancellor in the case of *Earl* v. *DeHart*, 1 Beas., 280 (sometimes cited in support of the opposite side), which would conflict with the view above and give a right of action for the stoppage of mere surface water, was expressly overruled.

The rule of the common law undoubtedly is that no action lies for obstructing the flow of surface water.

Washburn on Easements, 3rd Ed., pp. 281 and 282.

Benthall v. *Seifert*, 77 Ind., 302, and cases heretofore cited.

This is the rule adopted in most of the states. The contrary rule, which is derived from the civil law (Mackeldey's Roman Law, § 295), is adopted in some of the states and is defended as being founded upon the maxim *sic utere tuo ut alienum non laedas*. In criticising the use of this maxim by an Illinois judge, Judge REDFIELD in his notes to the case of *Sweet* v. *Cutts*, 11 Am. Law Reg. (N. S.), p. 23, says:

"But that estimable man and wise magistrate (Breese, C. J.), as well as learned and accomplished jurist, will be as ready as any one, we doubt not, to recognize the counter maxim of the law, that in the social state we are all constantly exposed to innumerable losses at the hands of others where we have no redress, the loss being *damnum absque injuria*, and that the benevolent maxim of the civil law, to which he refers, was never intended to demand of anyone to treat his neighbor better than himself, or to forego the use of his own property lest he might cause loss to others."

In speaking of the same maxim, ERLE, J., says, in *Benomi* v. *Backhouse*, 27 Law Journal (N. S.), Queen's Bench, 388:

"The maxim, *sic utere tuo ut alienum non laedas* is mere verbiage. A party may damage the property of another where the law permits and he may not where the law prohibits; so that the maxim can never be applied until the law is ascertained, and when it is the maxim is superfluous."

The doctrine of the common law in respect to drainage of surface water is more in consonance with our ideas of progress and improvement than that of the civil law. It is a doctrine which above all things should be applied in a new and growing country, and where there there can be little danger of damage from its application by reason of the rarity of rainfalls. Like light and air, no one has a right, beyond the custom of some places, as of London, to have it come over the land of his neighbor, as it might in the unimproved condition of such land. Nor can there be any difference in reason or upon principle whether the surface water flowed in ruts, arroyos or simply down a hillside. The right can be no greater. The rut simply indicates that the water has flowed with sufficient force to cut the surface, or wash out the softer parts of the earth, but this gives no greater right than if it came down in a slough or draw.

See the able discussion of DIXON, C. J., in *Hoyt* v. *City of Hudson*, *supra*.

Also,

Lessard v. *Stram*, 62 Wis., 112.
Johnson v. *C., St. P. M. & O. Ry. Co.*, 80 Wis., 645.
Robinson v. *Shanks*, 118 Ind., 134.
Hill v. *C., W. & M. Ry. Co.*, 109 Ind., 511.
Weis v. *City of Madison*, 75 Ind., 257; and other cases cited heretofore.

The authorities to the contrary will be found to be either overruled or pronounced by those courts adopting the rule of the civil law. It is a distinction without a difference.

In a dry country with scarcely any grass or turf but with a soluble earth, a sudden deluge of rain easily cuts ruts or gullies in the surface. Such gullies simply indicate the force and volume with which the water flowed, but do not show the frequency, as would be apparent from the same marks in a moist country covered with a compact turf.

By the common law, a party may improve and use his own lands in such manner as is most beneficial to him, while the doctrine of the civil law would virtually compel the owner to permit his lands to lie in a state of nature, and would thus place restrictions upon industry and enterprise and would unduly control the owner in the use of his property.

Of course, natural rights do not depend upon prescription, nor could the plaintiff claim any right thereby in this case, because the statutory period is not shown to

have elapsed, and there could be no right by prescription to the flow of mere surface water. Such occasional flowing does not show any act on the part of the owner of the higher tenement, whereby he claims and asserts a right against the owner of the lower tenement. The law is clearly settled that no length of time creates any easement by which the owner of the lower land is precluded from using it as he will, although the natural overflow of surface water may be thereby stopped and set back upon the upper lands.

Angel on Watercourses, Sec. 108 *a*.

Parks v. *The City*, 10 Gray, 28.

Luther v. *Winnisimmet Company*, 9 Cushing, 171.

Pettigrew v. *Evansville*, 25 Wis., 227, 228.

Where surface water is permitted to run as it has always done there is wanting some act of the party asserting the right. There could be no adverse user under a claim of right, and the user, to gain by prescription, would have to be such as to expose the party to an action unless he had a grant or permission.

See:

Felton v. *Simpson*, 11 Iredell's Law (N. C.), 85.

Opinion of COCKBURN, C. J., in *Angus* v. *Dalton*, 17 Am. Law. Reg. (N. S.), 646, and note on page 666.

It further appears from the findings that the railroad embankments were constructed before plaintiff's premises were improved.

The inconsistency of the special findings with the general verdict is manifest. The jury find against the plaintiff upon several material facts necessary to be established to make out a case under the declaration. The general verdict must therefore be ignored, because shown to be a wrong conclusion. The court did not err in overruling the plaintiff's motion for judgment upon the general verdict. The judgment in favor of the defendant upon the special findings was correct.

Respectfully submitted.

E. D. KENNA,
ROBERT DUNLAP,
Attorneys for Defendant in Error.